FILED
JUL 18

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

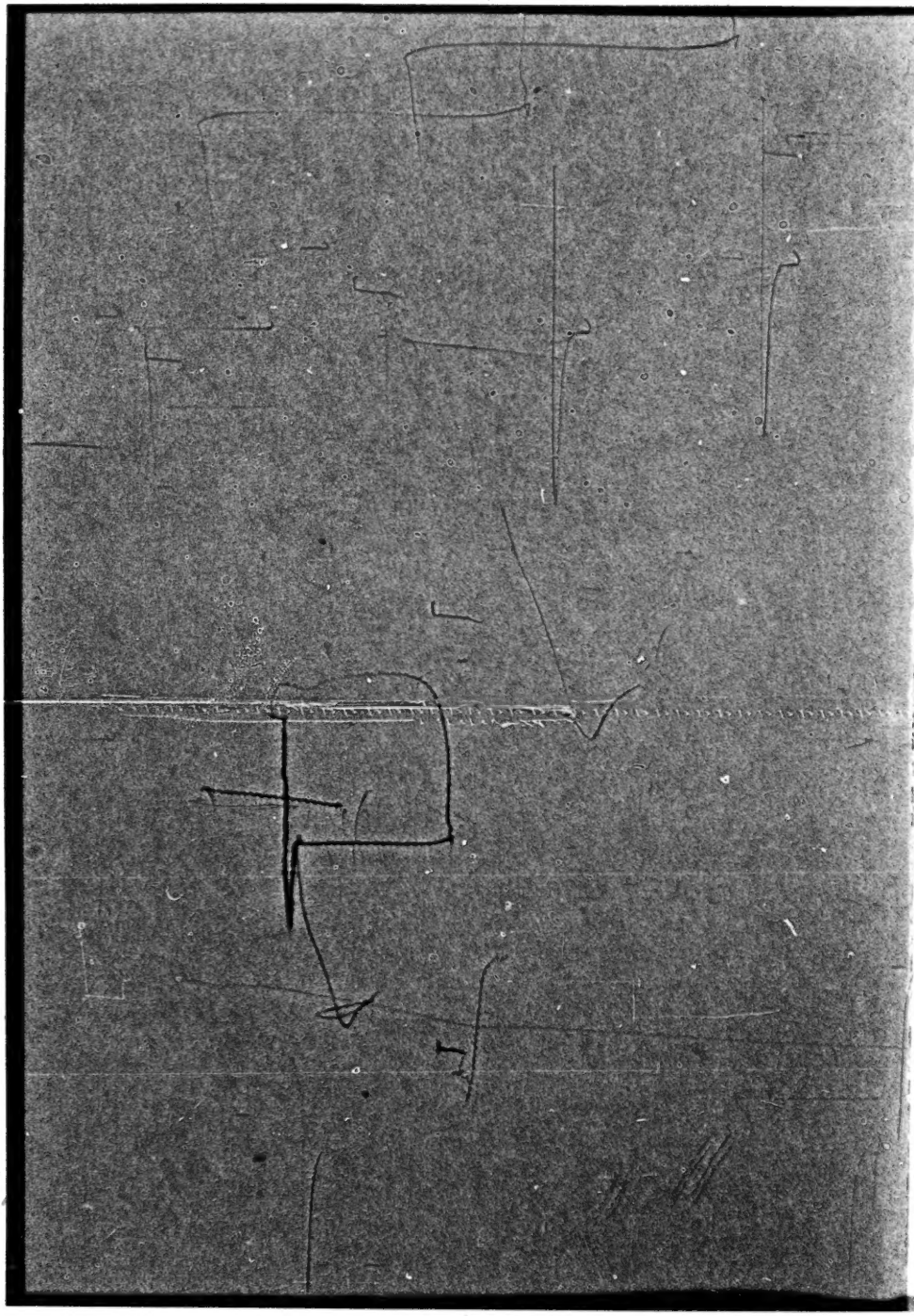
WILLIE JOHNSON, JR.,
PETITIONER,

v.

RAILWAY EXPRESS AGENCY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 24, 1974
CERTIORARI GRANTED JUNE 3, 1974



INDEX

	PAGE
Docket Entries	1a
Complaint, with Exhibits	4a
Exhibit 1—EEOC Final Investigation Report	14a
Exhibit 2—Letter dated February 17, 1972 from William E. Caldwell to Hon. Bailey Brown	45a
Exhibit 3—Order Dismissing Action (No. C-71-66) Without Prejudice	47a
Exhibit 4—Letter dated May 5, 1972 from William E. Caldwell to Hon. Bailey Brown	49a
Exhibit 5—Letter dated May 8, 1972 from Hon. Bailey Brown to William E. Caldwell	51a
Answer of REA Express, Inc.	52a
Motion of Defendants Tri-State Local, etc. with Appendices*	58a
Appendix A—Supplemental Complaint in No. C-71-66	60a
Appendix B—Answer of Defendants Tri-State Local, etc. in No. C-71-66	67a
Appendix C—Motion of Defendants Tri-State Local etc. in No. C-71-66, with Affidavit*	72a

* Appendix F, Supplemental Memorandum in Support of Motion, has been omitted.

PAGE

Appendix D—Interrogatories of Defendants Tri-State Local, etc. to Plaintiff, etc. in No. C-71-66 ..... 77a

Appendix E—Answer to Interrogatories of Defendants Tri-State Local, etc. to Plaintiff, etc. in No. C-71-66 ..... 86a

Appendix G—Order with Respect to Motions to Dismiss, etc. in No. C-71-66 ..... 91a

Motion of Defendant REA Express, Inc. etc. 94a

Amendment to Motion of Defendants Tri-State Local, etc. 96a

Order on Defendant Motions for Judgment 98a

Opinion of United States Court of Appeals 105a

Opinion on Petition for Rehearing 114a

* Exhibits to Affidavit have been omitted.

Docket Entries

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

C-72-183

WILLIE JOHNSON, JR.,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL, and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL.

5/31/72	Filed Complaint, exhibits 1 thru 5.
5/31/72	Filed Cost Bond for $250.00, Wm. E. Caldwell, Surety.
6/12/72	Filed Stipulation Extending time to Answer through July 25, 1972.
6/27/72	Filed Answer of REA Express, Inc.
7/25/72	Filed Motion—defts Tri-State Local to Dismiss Complaint, or in alternative to grant Summary Judgment.
7/25/72	Filed Memorandum of Points and Authorities of defts. BRAC Locals in support of Motion to Dismiss or in alternative for Summary Judgment on ground of res judicata.
8/25/72	Filed Motion of the Defendant REA Express, Inc. to Dismiss the Complaint, or in the alternative to Grant Summary Judgment.

Docket Entries

8/25/72	Filed Memorandum in Support of Defendant's Motion to Dismiss or in the alternative to Grant Summary Judgment.
9/ 7/72	Filed Amendment to Motion of Defts. Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks to Dismiss the Complaint or in the alternative to Grant said defendants Summary Judgment.
9/25/72	Filed Memorandum in opposition of Defendants REA Express, Inc. and Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks to Dismiss the Complaint or in the alternative to Grant said Defendants Summary Judgment.
10/ 4/72	Filed Reply of Defendants Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway and Airline Clerks to Memorandum of Plaintiff in opposition to Motion to Dismiss the Complaint or, in the Alternative, to Grant said Defendants Summary Judgment. Copy Judge.
1/25/73	Filed Order on Defendant Motions for Judgment—grant all defendants' motions and dismiss the Complaint but at the cost of REA. Copies to Caldwell, Greenberg, Belz, Highsaw and Morrow.
2/21/73	Filed Notice of Appeal by the Plaintiff. Copies to Highsaw, Belz and Morrow and Court Reporter.
2/21/73	Filed Appeal Bond in amount of $250.00. Bill Caldwell, surety.

CERTIFICATE

I, W. Lloyd Johnson, Clerk of the United States District Court for the Western District of Tennessee, do hereby certify that the above index of the docket entries is a true and correct copy of all relevant docket entries which appear on the docket in this office. This 26th day of March, 1973.

W. LLOYD JOHNSON, CLERK
BY: D.C.

Complaint

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-72-183

[Title omitted in printing]

I.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 2000e-5(f). This is a suit in equity authorized and instituted pursuant to Title VII of the Act known as the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and 42 U.S.C. §§ 1981, 1982, 1983 and 1988. The jurisdiction of this court is invoked to secure protection of and to redress the deprivation of rights secured by (a) Title VII of the Act known as the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., providing for injunctive and other relief against racial discrimination in employment, and (b) 42 U.S.C. § 1981, 1982 and 1983, providing for equal rights of citizens and all persons within the jurisdiction of the United States.

II.

This is a proceeding for preliminary and permanent injunctions restraining defendants from maintaining a policy, practice, custom or usage of withholding, denying or attempting to withhold or deny, and depriving or attempting to deprive or otherwise interfering with the rights of plaintiff and other Negro persons similarly situated to equal employment opportunities at Railway Express Agency, Inc., Memphis, Tennessee, and equal labor representation

by Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local, without discrimination on grounds of race or color.

III.

Plaintiff is a Negro citizen of the United States, residing in the State of Tennessee. The defendant, Railway Express Agency, Inc., [hereafter, REA] is a corporation doing business in the State of Tennessee, and City of Memphis, and is an employer within the meaning of 42 U.S.C. § 2000e(b) in that it is engaged in industry affecting interstate commerce and employs more than tweny-five (25) persons.

IV.

Defendant, Brotherhood of Railway Clerks Lily of the Valley Local is an unincorporated association of production workers employed at defendant REA, and defendant, Brotherhood of Railway Clerks Tri-State Local is an unincorporated association of workers employed at defendant REA. On behalf of its members, defendant Union Locals enter into collective bargaining agreements dealing with the terms and conditions of employment of persons employed at defendant REA in Memphis, Tennessee. The principal office of the Brotherhood of Railway Clerks Tri-State Local is 3131 Radford Road, Memphis, Tennessee. The Union Locals are a labor organization within the meaning of 42 U.S.C. § 2000e(d), and are engaged in industry affecting commerce within the meaning of 42 U.S.C. § 2000(e).

V.

Plaintiff alleges that he was employed by REA from the Spring of 1964 until the spring of 1967. Plaintiff alleges

that at all times relevant hereto REA follows a policy and practice of racial discrimination in that:

(1) Defendant REA denies Negro employees equal promotion opportunities with white employees;

(2) Defendant REA in conjunction with defendant Union Locals, assigns, reassigns, promotes and otherwise acts or fails to act in such a manner as to maintain a preexisting pattern of racial discrimination in employment;

(3) Defendant REA directs membership in defendant Union Locals according to race;

(4) Defendant REA discriminates on the basis of race in job assignments, extra work assignments and the application of seniority rules;

(5) Defendant REA employs racially dual standards for conditions of employment and discriminates against black employees in the application of disciplinary procedures and actions.

Plaintiff further alleges that he was denied the same opportunity to obtain supervisory training and promotion which the defendant Railway Express Agency, Inc. provides white employees. Plaintiff further alleges that his employment with defendant REA was terminated on June 20, 1967, because of plaintiff's race and in accordance with the racially discriminatory policies and practices set forth above.

VI.

Plaintiff alleges that he was a member of the Brotherhood of Railway Clerks Lily of the Valley Local, one of the defendant Union Locals, and that he was denied mem-

bership in the Brotherhood of Railway Clerks Tri-State Local, which at all times relevant hereto excluded blacks from membership on the basis of race. Plaintiff alleges that the Union Locals followed a policy, custom or practice of racial discrimination in that they failed to defend the rights of Negro members in the same manner in which the rights of white members were defended. Plaintiff further alleges that he was denied equal labor representation because of his race and the segregation policies and practices of defendant Union Locals, and that he, because of his race, was forced to pay higher membership dues in the black Lily of the Valley Local than his white counterparts in the white Tri-State Local were required to pay.

VII.

Plaintiff filed timely charges with the Equal Employment Opportunity Commission [hereafter, EEOC] alleging the discriminatory policies and practices set forth herein. On December 22, 1967, the EEOC issued its "Final Investigation Report" (attached hereto as Exhibit 1) and recommended that the Commission find reasonable cause to believe that defendant, REA and Union Locals had discriminated against plaintiff in that the defendants had violated rights of the plaintiff guaranteed under Title VII of the Civil Rights Act of 1964 by failing to grant plaintiff equal opportunity for employment advancement, by discriminatorily discharging plaintiff and by failing to represent plaintiff in the same manner as white employees are represented.

VIII.

(A) This is the second complaint filed by plaintiff against defendants REA and Union Locals concerning the matters set forth herein and seeking the relief requested

herein. On or about January 15, 1971, plaintiff received a "Notice of Right to Sue" letter from the EEOC. At that time plaintiff was financially unable to employ counsel to represent him in his claims against defendants. Plaintiff had attempted to obtain counsel on his own and had been in contact with, among others, Ratner, Sugarmon & Lucas, undersigned counsel in this complaint. Ratner, Sugarmon & Lucas was unable to accept representation of plaintiff because (1) of plaintiff's poverty and his consequent inability to pay expenses of the contemplated litigation, and (2) the great number of pending Title VII cases to which this Court had appointed Ratner, Sugarmon & Lucas as counsel of record.

(B) On February 12, 1971, this Court entered orders appointing Robert E. Rose, Esq. as attorney for plaintiff and allowing plaintiff's "Notice of Right to Sue" letter be filed and treated as a complaint on a pauper's oath, which documents were docketed as Civil No. C-71-66. Subsequently, on March 18, 1971, a "Supplemental Complaint" was filed on plaintiff's behalf by his court-appointed attorney. Defendant REA filed its answer on March 29, 1971, and defendant Union Locals filed their answer on April 6, 1971. Thereafter, the case was set for trial on August 18, 1971. On April 30, 1971, defendant Union Locals filed a motion to dismiss or in the alternative for summary judgment, with supporting affidavits and memoranda of law. May 11, 1971, defendant Union Locals propounded 43 numbered interrogatories to plaintiff. June 3, 1971, defendant REA filed a motion to dismiss or in the alternative for summary judgment, along with supporting affidavits and memoranda of law. No memoranda or affidavits were ever

filed on behalf of plaintiff in opposition to defendants' motions.

(C) On June 30, 1971, the Honorable Bailey Brown, Chief Judge of this Court, entered an order on defendants' motions, which: (1) dismissed plaintiff's claims insofar as they were based on statutes other than Title VII of the Civil Rights Act of 1964; (2) granted summary judgment to defendant Union Locals; (3) granted summary judgment to defendant REA "with respect to the claim of dismissal for not giving plaintiffs supervisory training"; (4) denied defendant REA's motion with respect to plaintiff's charge of discriminatory discharge and plaintiff's claim of denial of equal promotion opportunities and discriminatory job assignments; (5) denied the defendants' motions to dismiss on the grounds that filing the "Notice of Right to Sue" letter did not constitute the filing of a complaint within the time allowed. This order was a consolidated ruling in plaintiff's case and in No. C-71-2 (Thomas Thornton v. the same defendants).

(D) On June 22, 1971, defendant REA propounded 41 numbered interrogatories to plaintiff. On August 9, 1971, defendant REA filed its pre-trial memorandum. The case was re-set for trial to February 2, 1972. On November 23, 1971, defendant REA pursuant to notice took plaintiff's deposition.

(E) No discovery, by depositions, interrogatories or any other manner permitted by the Federal Rules of Civil Procedure, was ever undertaken on behalf of plaintiff, and no pre-trial memorandum of points and authorities was ever filed on plaintiff's behalf.

(F) Defendant REA made a "nuisance" settlement offer of $150.00 to plaintiff, which plaintiff refused to accept

despite the insistence of his court-appointed attorney. On January 5, 1972, plaintiff's court-appointed attorney filed a motion to be relieved as attorney of record for plaintiff based on the following grounds: (1) because plaintiff's case was "questionable" in his view; (2) because plaintiff refused to accept defendant REA's $150.00 settlement offer; (3) because plaintiff was unable to substantiate monetary damages and because plaintiff "has not expressed any intention of advancing the funds that would be necessary for taking numerous discovery depositions to prepare plaintiff's case for trial." (Plaintiff denies the first and third grounds of the motion to withdraw.)

(G) Although no order was ever entered allowing plaintiff's court-appointed attorney to withdraw as counsel of record, plaintiff received a letter dated January 14, 1972, from the Honorable W. Lloyd Johnson, Clerk of this Court, stating that the motion of plaintiff's court-appointed attorney to withdraw had been allowed on the same date (January 14, 1972), that the case would have to be reset for trial from February 2, 1972, and "that if you [plaintiff] do not obtain another counsel to represent you within 30 days from this date, your claim will be dismissed without prejudice."

(H) Plaintiff contacted numerous attorneys in Memphis, but was unable to obtain representation within the time allowed. Although representation had previously been refused by Ratner, Sugarmon & Lucas, plaintiff returned to that firm toward the end of the 30-day period allowed by the Clerk's letter of January 14, 1972, and talked to undersigned counsel regarding representation of plaintiff in this matter. Although undersigned counsel was unable to rep-

resent plaintiff because of plaintiff's poverty and consequent inability to pay discovery expenses in the case, undersigned counsel did agree to attempt to secure financial support for continuation of plaintiff's cause of action. By letter dated February 17, 1972 (attached hereto as Exhibit 2) to the Honorable Bailey Brown, undersigned counsel stated that he was attempting to secure financial support for plaintiff's case and requested an additional 30 days within which plaintiff might attempt to secure legal representation. However, the Court had already, on February 16, 1972, entered an order (attached hereto as Exhibit 3) dismissing plaintiff's action without prejudice. After diligent efforts, undersigned counsel succeeded in obtaining an agreement from the N.A.A.C.P. Legal Defense Fund to underwrite discovery costs and expenses for plaintiff to continue his cause of action against defendants. Promptly after receiving such agreement, undersigned counsel, by letter dated May 5, 1972 (attached hereto as Exhibit 4), wrote Judge Brown informing him of the agreement stating that undersigned counsel had agreed to represent plaintiff and requesting that plaintiff's case be reinstated on the active docket of this Court. By letter dated May 8, 1972 (attached hereto as Exhibit 5), Judge Brown informed undersigned counsel that the proper way to handle reactivating plaintiff's case would be to file a new action. This complaint is being filed pursuant to Judge Brown's direction.

IX.

Neither the State of Tennessee nor the City of Memphis has a law prohibiting the unlawful employment practices alleged herein.

X.

Plaintiff alleges that he has no adequate and complete remedy at law to redress the wrongs alleged herein other than this suit for a permanent junction. Plaintiff is now suffering and will continue to suffer irreparable injury from the defendants' policies, practices, customs and usages as set forth herein.

XI.

WHEREFORE, plaintiff prays that this Court advance this case on the docket, order a speedy hearing at the earliest practicable date and cause this case to be in every way expedited and upon such hearing:

(1) Grant plaintiff a permanent injunction enjoining the defendants, their agents, their successors, employees, attorneys and those acting in concert with them or at their direction from continuing and maintaining the policies, practices, customs and usages of denying, abridging, withholding, conditioning, limiting or otherwise interfering, individually and/or jointly, with the rights of the plaintiff as provided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq.

2. Grant the plaintiff a permanent injunction enjoining the defendants, their agents, successors, employees, attorneys and those acting in concert with them or at their direction from denying employment to plaintiff and from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering individually and/or jointly, with the rights of the plaintiff to enjoy equal employment opportunities for advancement and/or training as directed by

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq.

(3) Order plaintiff reinstated in the employment of defendant REA at the same position and salary level and with the same benefits to which he would be entitled but for his unlawful termination.

(4) Grant the plaintiff judgment in the amount of back pay, including all raises, bonuses and fringe benefits, to which he would have been entitled, and union membership dues which would not have been paid, but for the discriminatory policies and practices complained of herein.

(5) Award plaintiff the costs of this action, together with reasonable attorney's fees as provided in Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. §2000e (5)(k).

(6) Grant plaintiff such other, further, additional and/or alternative relief as the needs of justice require.

Respectfully submitted,

RATNER, SUGARMON & LUCAS

By: /s/ WILLIAM E. CALDWELL
WILLIAM E. CALDWELL
URAL B. ADAMS, JR.
525 Commerce Title Building
Memphis, Tennessee 38103

JACK GREENBERG
WILLIAM L. ROBINSON
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

Exhibit 1 (To Complaint)

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: December 22, 1967

To: Director of Compliance

FROM: Walter M. Dickerson

SUBJECT: Willie Johnson et al.
vs
Railway Express Agency
and
Brotherhood of Railway Clerks
Tri-State Local
Memphis, Tennessee
and
Brotherhood of Railway Clerks
Lily of the Valley Local
Memphis, Tennessee

Case Numbers: NO 7-6-822 & U
thru
NO 7-6-828 & U
NO 68-8-148E
NO 6-10-205
NO 6-10-152

FINAL INVESTIGATION REPORT

I. THE CHARGE:

All of the Charging Parties allege that they have been discriminated against because of their race (Negro).

Exhibit 1 (To Complaint)

Willie Johnson, Lorenza McGaha, James Tinnon, W. E. Gilliland, Claude Elliott, Aaron Kern and Noble Boyd all allege that:

1. The unions maintain racially segregated locals; Tri-State Local for white members and Lily of the Valley Local for Negroes.
2. The cost of membership is greater with the Negro local.
3. The firm directs membership affiliation according to race.
4. The firm dscriminates against Negroes on the extra work list with respect to the seniority rules and job assignments.

In addition, Willie Johnson also alleges that:

1. The firm employs dual standards, based on race, for conditions of employment and disciplinary action.
2. The firm required him to sign an undated resignation form a year before it was executed.

William Worsham, Thomas Thornton and James Oliver allege that they were terminated by the firm because they are Negroes.

II. Chronology of Events:

May 31, 1967	Willie Johnson, Lorenza McGaha, James Tinnion, W. E. Gilliland, Claude Elliott, Aaron Kern and Noble Boyd file with EEOC

Exhibit 1 (To Complaint)

June 20, 1967	Willie Johnson terminated by firm
September 6, 1967	Willie Johnson amends charge with EEOC
June 27, 1967	William Worsham employed at firm
July 27, 1967	William Worsham terminated
August 1, 1967	William Worsham files with EEOC
August 24, 1966	Thomas Thornton employed at firm
September 3, 1966	Thomas Thornton terminated
September 12, 1966	Thomas Thornton files with EEOC
August 3, 1966	James Oliver employed at firm
September 22, 1967	James Oliver terminated
September 27, 1967	James Oliver files with EEOC
October 20, 1966	EEOC cases for Thomas Thornton and James Oliver assigned for investigation
September 5, 1967	EEOC cases for Thornton and Oliver assigned for re-investigation

III. BACKGROUND:

Memphis, Tennessee is located on the northwest border of the State of Mississippi, along the Mississippi River, and it is the highest populated city in the State.

Exhibit 1 (To Complaint)

The present population, projected by possible accretions from the 1965 census by the New Orleans EEOC Regional Office, is 766,000 for the Memphis Standard Metropolitan Statistical Area. It is estimated that Negroes represent 38.4% of the total population.

The area's economy is enhanced by a diversification of industries: manufacturing, transportation, agricultural, governmental, banking, and others. Major industries in the area include: E. I. DuPont de Nemours & Company, Kellog Company, Kimberly-Clark, Buckeye Cellulose, Armour and Company, and others. The health industry puts about $200,000 daily into the community's economy. (Memphis Chamber of Commerce).

Industrial employment statistics indicate that Negro employment is highest among the blue collar workers (40% Negro), laborers (64.2% Negro), operatives (37.1% Negro), and service workers (46.3% Negro). (These statistics have been obtained from a compilation of EEO-1 reports by the New Orleans Regional Office of the EEOC).

The Respondent has been the subject of previous EEO investigations, two of which are incorporated in this report for re-investigation; is a Plans for Progress Firm; meets the definition of Employer under Title VII of the Civil Rights Act of 1964 and is a government contractor, the predominant interest agency being the U.S. Army.

Employees at the firm are represented by the Brotherhood of Railway Clerks and both the firm and the union are within the jurisdiction of the EEOC.

Exhibit 1 (To Complaint)

The national office of the Respondent firm is addressed:

210 E. 42nd Street
New York, New York

IV. SUMMARY OF THE INVESTIGATION:

A. Position of the Charging Parties:

1. Willie Johnson, Lorenza McGaha, James Tinnion, W. E. Gilliland, Claude Elliott, Aaron Kern and Noble Boyd all allege that the Respondent firm practices discrimination against Negroes in the manner in which the seniority rules are applied and in job assignments on the extra work list. (Tab B-1).

The Charging Parties stated that when work falls off, employees are laid off by seniority and placed on a day-to-day call basis. They claim that such persons are placed on an extra work list and are intended for recall to work on a seniority basis. However, continued the Charging Parties, Negroes are not considered for recall to various non-traditional jobs such as foremen, and clerk. They said Negroes are called back, regardless of their seniority, for jobs as freight handlers or truck drivers when actually all employees on this extra work list are classified to do jobs in all areas. (Tab B-1). Aaron Kern stated that he entered a bid as Chauffeur (Truck Driver) during the time that there were no Negroes n that classification. He said that this resulted in his foreman telling him that he ha dbeen terminated. After much

discussion, claims Kern, the foreman had him sign an undated resignation form and told him that if he ever "messed up" again the foreman would date and execute the form.

Kern claims that white employees were "passed around" him because of job classification that he was not permitted to hold. He said that this resulted in his seniority being displaced behind the white employees who were actually junior to him (Tab D-4). All of the remaining Charging Parties entered supporting statements (Tabs D-3 thru D-7).

Seven witnesses, contacted by the Investigator, supported the contentions of the Charging Parties that the extra work list arrangement discriminates against Negro employees in the manner in which job assignments are made. All of the witnesses claim that Negroes are called in to perform duties of Freight Handlers or Truck Drivers and, in some rare instances, Negroes have been called as Checkers. (Tabs D-8 thru D-14).

Jesse Whitfield (witness) stated that the firm has not elected to permit his being trained as a Checker yet white employees who are junior to him have been given this opportunity. (Tab D-9).

Robert Boykin, (witness) stated that his foreman assigned him to a Checker job only to have another foreman change the assignment (Tab D-11).

Exhibit 1 (To Complaint)

Albert McCulley stated:

"The firm employs and trains white employees as Clerks, Checkers and Foremen over senior qualified Negroes with more experience."

". . . Regular employees are not allowed to 'bump' on jobs in which they are not qualified. Negroes are not given the opportunity to qualify on these jobs as extra board employees—white employees are.

Supervisors tests are administered by the firm. Management approaches the employee to take the test. No Negro has ever been approached by management to take the test. . ." (Tab D-13).

2. Willie Johnson, in an amended charge, stated that the firm employs dual standards, based on race, for conditions of employment and disciplinary action. He said that he was terminated from the firm after being required to sign an undated resignation form a year before it was executed. He said that the error he committed, that resulted in his termination, is common-place among white employees. (Tab B-2).

Expanding on his statement, Johnson said:

"About one year ago, as a result of my taking off from work to attend a funeral of my Aunt, the firm forced me to sign an undated resignation form. This action was prompted

by my foreman, a Mr. Pittman, who gave the wrong information to his superior about my absence."

"About February or March of this year, I encountered an accident in the operation of a tractor and trailer truck that I was just learning to operate. I misjudged the height of an underpass and bumped the truck into it."

"On Monday, June 19, 1967, while making my first deliveries as a truck driver, I inadvertently accepted the wrong receipts from a customer. I had come upon the job of truck driver by 'bumping' a junior white employee. My foreman, Mr. Anderson, called my attention to the error and I was sent back to the customer to obtain the correct receipts, which I did. It was then that the firm entered a current date on the resignation (form) that I had signed over a year ago. This practice is commonplace with the firm in its dealings with Negro employees."

Charging Parties Kern, Elliott, McGaha, and Boyd all support Johnson's statement that he was required to sign an undated resignation form and that the error he committed is commonplace among white employees (Tabs D-4 thru D-7).

Jesse Whitfield (witness) stated that white employees are generally given better treatment and Negroes are dealt with more severely.

He said that Willie Johnson was terminated because he "stood up for his rights" and white employees are seldom disciplined (Tab D-9).

Robert Caldwell (witness) stated that he had observed Foreman Cornelius harassing Willie Johnson (Tab D-10).

Robert Boykin (witness) stated that he felt that Willie Johnson was fired because he (Johnson) was outspoken. Boykin also said that he had observed Foreman Cornelius harassing Johnson on many occasions (Tab D-11).

Albert McCulley (witness) stated:

"... The firm deals more severely with Negro employees than with white employees." (Tab D-13).

Archie Parson (witness) stated that the foremen and supervisors are usually more severe in giving work orders or according disciplinary measures against Negroes (Tab D-14).

3. William Worsham, Thomas Thornton and James Oliver allege that they were terminated by the firm because of the discriminatory practices employed by the firm against Negroes (Tab B-3).

Thornton stated that he applied for work on August 23, 1966, and started with the firm on August 24, 1966. He claims that his work was satisfactory and he had no problems until his foreman addressed him as "boy". After taking exception to the manner in which he was

addressed, Thornton claims that he was subsequently terminated because of the incident (Tab B-3, page 1).

James Oliver alleges that after about six weeks of employment he was terminated and the reason given was that he had a police record. Oliver stated that he had been arrested but had gained employment at the U. S. Post Office where the security requirements were higher than at REA. He feels, therefore, that he was discriminated against by REA because he is a Negro (Tab B-3, page 2).

In an interview with a previous investigator, Oliver stated that the firm hires Negroes for six weeks and then at the end of that period 9 out of 10 are laid off. He said that white employees are hired but he doesn't know of any who are laid off (Tab D-2).

B. Position of the Respondent.

On September 20, 1967, two investigators, Odell Clark and Walter Dickerson, keeping a prearranged appointment made by telephone, met with Mr. A. A. Steward, Manager for the Memphis Terminal for the Respondent. Mr. Steward receipted service of the charges (Tab C). Mr. Steward then told the investigators that they could telephone either him or the District Superintendent at St. Louis, Missouri, at a later date for any information they might need. After an explanation of the procedures of the EEOC investigation, Mr. Steward stated that he would have to confer with

his District Superintendent and that, for security reasons, he was certain that the records of the firm could not be examined. Mr. Steward then terminated the conversation.

On September 12, 1967, acting on information gained through an investigation of the Respondent at another locality, a telephone call was placed to the national office of the firm at New York City. The investigator spoke with the Vice President of Personnel Services with the Respondent, Mr. Clement Lane. Mr. Lane expressed dissatisfaction over the fact that local officials were uncooperative in such matters and said that he would look into the situation.

On September 19, 1967, Mr. G. L. Hall, Division Operations Manager at the Memphis Terminal, telephoned the investigator and set an appointment for the following day.

The investigators met with Mr. Hall and Mr. Steward at a site removed from the Memphis Terminal in the general offices located in the I. C. Railroad Building. This made the investigation difficult from the standpoint of examining records over and above those brought into the conference room by the Respondent. Mr. Hall categorically and emphatically denied all allegations.

Directing the investigation to the attention of paragraph 3 of the charges by seven Charging Parties, Mr. Hall stated the extra work list is administered in strict accordance with seniority and qualifications. He said that in order to bid on

a position, the employee must first have knowledge of the job. Hall said that temporary positions from the extra work list are not posted for bid.

Hall said that Willie Johnson was terminated for failing to follow instructions. He said that a hearing was conducted and Johnson was found guilty of insubordination in that he did not do what his foreman told him to do.

A request for copies of the hearing concerning Johnson was refused by the firm. Subsequent requests were, too, refused (Tab J).

Both Hall and Steward readily admitted that they employ the practice of requiring an employee to sign an undated resignation form. However, they contend that such requirements are made of both white and Negro employees. Johnson, they said, was terminated by simply filling in the current date on a form that he had signed a year earlier.

Hall stated that William Worsham was terminated under the provisions of the national contract that, "Employees must comply with the wishes of persons he is employed under." Hall said that this is reflected in Worsham's work record. Hall could not quote the section of the agreement that covered the matter but he stated that he would provide a copy of the contract. Hall said that he had no personal recollection of the situation involving Worsham but he had read the records of the case.

Mr. Steward said that he did not recall Mr. Worsham and that the picture attached to the application, "Didn't ring a bell". Steward offered that

some employees are terminated without being given a reason for termination. He said that such instructions are contained in the security regulations (Tab F-14).

Hall stated that the OJT program is administered without prejudice. He said that a record of all employees who are hired, fired, or quit, is sent to both unions monthly. When queried as to what he meant by both unions, Steward answered the question that was asked of Hall with, "The one for the niggars and the one for the whites."

Hall admitted that there were no Negro supervisors, foremen, clerks, cashiers, adjusters, telephone operators or money deliverymen. Hall said that the firm employs the use of a Supervisor's Test for promotion to Supervisor. He said that the method of selection is that a man must show intelligence and that a candidate is personally observed by the Manager and the Superintendent and may be assigned on an acting basis for this period of observation. Hall said that such a person might come from the ranks or hired from outside. Women are not considered, he concluded.

Steward added that a successful applicant must have had supervisor's experience and *must have been classified as a foreman.*

Hall said that most Negroes are Express Handlers and assorters. He said that there were some Negro Chauffeurs (Truck Drivers) and some Checkers. Hall hastened to point out that there was only the difference between $126.00 per week and $128.00 per week in most of the job classifications.

Exhibit 1 (To Complaint)

The Respondent firm was not cooperative in providing the documentation necessary for the investigation. Hall stated that an EEO-1 had been prepared during the normal reporting period and sent to the national office. Further correspondence on the matter had negative results (Tab J). Hall refused to produce records of the hearings concerned with the termination of Willie Johnson. Again correspondence on the matter did not result in obtaining the records (Tab J). The request for work records of certain employees produced typewritten job progression information (Tabs F-3, 8, 9 & 10).

NOTE: At this point, because of previous commitments concerned with another case, one investigator left the investigation which was completed by the writer.

During the initial interview, Mr. Steward gave the following account of the events leading to the discharge of Willie Johnson:

"Willie was assigned to pick up at three locations within one firm (International Harvester). He did not sign the necessary documents at one stop. At another he signed the documents but didn't pick up the freight. He billed one shipment collect instead of prepaid".

"He was told to return to International Harvester immediately upon starting his route the next day to correct the mistakes he had made. This would mean that if he had followed instructions he would have reached the customer around 11 a.m. or 12:00 noon. At 2:00 p.m., the Traffic Manager at Inter-

national Harvester called to say that Johnson still had not arrived. W. S. Anderson, a foreman, gave Johnson the instructions to go to the customer immediately". (Tab E-1).

The investigator interviewed Mr. W. S. Anderson, foreman with the Respondent.

Mr. Anderson stated that he personally gave Johnson instructions to straighten out the error first. He said that he allowed Johnson to load his truck and proceed in a normal manner. He stated that his only instructions were to straighten out the order with International Harvester before he went anywhere else. Anderson said that he had no idea as to when Johnson left the loading dock. The first indication he had that Johnson had not followed instructions was when Mr. R. J. Fergerson, the Assistant Manager, said that International Harvester had called.

Anderson stated that Johnson would have been cited for the error anyway even if he had corrected the error. Anderson did not recall the chain of events involved in the error Johnson allegedly committed. He didn't recall his specific instructions to Johnson beyond telling him to correct the errors before he mad other deliveries or pick-ups. (Tab E-7)

The investigator met with Mr. R. J. Fergerson, Assistant Manager with the Memphis Terminal. Mr. Fergerson stated that he did not recall William Worsham nor the circumstances surrounding his termination. He did recall that Willie Johnson was terminated for insubordination. He said

that previous demerits or past record was not a factor in Johnson's termination *because insubordination is automatic termination.* On other subjects, Fergerson contended that he practiced EEO policies that were given to him through the manager. He said that there were no formal EEO meetings and that there was no discrimination at the plant.

Fergerson said that there were no Negro foreman or clerks because Negroes had not bid on such jobs. He said that such jobs that were considered non-bid jobs were not filled by Negroes because they didn't have sufficient seniority to be appointed (Tab E-5).

C. Union Situation:

Charging Parties Johnson, McGaha, Tinnion, Gilliland, Elliott, Kern and Boyd allege that the union maintains racially segregated locals; Tri State Local for white members and Lily of the Valley Local for Negroes. They further allege that the cost of membership is greater with the Negro local.

The Respondent firm admitted that the locals of the Brotherhood of Railroad Clerks were racially segregated but offered little other information. Hall denied that the firm referred Negroes to the Lily of the Valley Local and white employees to the Tri State Local. He said that the only information provided the new employee is that union membership is available to them after 60 days employment.

Hall verified that the dues are $5.00 with the Lily of the Valley Local and $4.00 with the Tri State Local. Hall stated that the union contract is negotiated on a national level and that he has little contact with the local officials.

Mr. Steward stated that he did not have local addresses for the unions, but that mail addressed in care of Railway Express at Memphis would be delivered to the proper parties. He stated that the chairman for the white local worked in the office at the firm and the chairman for the Negro local worked for the I. C. Railroad.

Many unsuccessful attempts were made to contact the officials of the local unions. Since it was determined that all of the allegations, concerned with the union, had been answered in the investigation, the charges were served by mail (Tab I).

D. Plant Tour:

The plant tour showed that all of the restrooms have been recently renovated with the removal of walls to end the discriminatory practice of segregated restrooms. Lockers are arranged in areas adjoining the restrooms and Mr. R. J. Fergerson, the Assistant Manager for the firm, said that the lockers were assigned in a non-discriminatory manner. There was no visual contact made of employees using the locker area, however, random conversation with several employees in the work area indicated that there were no problems concerned with locker or rest areas. There are no official lunch rooms and there is no cafeteria.

Exhibit 1 (To Complaint)

Conversation with one un-named Negro employee produced the fact that he is an extra board employee and that he was called to work jobs as Express Handler and Assorter only. He said that white employees who are junior to him are often called to work as clerks, checkers, or foremen. He said that some few Negroes had been called as checkers. Assistant Manager Fergerson witnessed the conversation.

EEO posters were displayed in proper places. Conversations with Assistant Manager Fergerson, Foremen Cantrell, Anderson and McClunney indicated that they were verbal in stating that there were no discriminatory practices at the firm, but had no formal exposure to meetings, publications or discussions on company policy.

At the time of the plant tour, questions concerning the duties of various employees were put to Mr. Fergerson. There were no Negroes observed working in capacities other than Express Handlers and Assorters.

E. Closing Letter

Because of the difficulty in obtaining documents and the firms failure to respond to communications, a delayed closing letter was mailed on December 21, 1967.

F. Exit Interview

The exit interview did not produce any new information concerned with the investigation except that Charging Party Willie Johnson has obtained

legal council in his case. His lawyer, Mr. Louis R. Lucas, of Ratnee, Thomson, Sugarmon, Lucas & Willis at Memphis, wishes to be informed of any contact made with his client.

Mr. Johnson's rebuttal is incorporated in this report (Tab D-3 page 2).

V. Investigative Conclusions—Alleged Violations

A. Willie Johnson, Lorenza McGaha, James Tinnian, W. E. Gilliland, Claude Elliott, Aaron Kern and Noble Boyd all allege that:

1. The unions maintain racially segregated locals. The investigation showed that:

   a) Employees at the Respondent Firm are represented by the *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees* (Tab H-1)

   b) The Tri State local of the above union represents white employees at the Respondent firm and the Lily of the Valley local represents Negro employees. This fact is attested to by all of the Charging Parties and all of the witnesses (Tabs D-3 thru D-14). The Respondent firm admits the charge is accurate (Tabs E-1 & E-2).

2. The cost of membership is greater with the Negro local. The investigation showed that:

   a) The cost of membership with the Lily of the Valley Local (Negro) is $5.00 per month. The cost of membership with the Tri State

Exhibit 1 (To Complaint)

Local (white) is $4.00 per month (See Tabs B-1 & E-1)

3. The firm directs membership affiliation (union) according to race. The investigation showed that:

   a) The firm denied that it directs which local an employee should affiliate with (Tab E-2).

   b) Conversation with the Charging Parties and witnesses and random conversation with Negro employees at the firm indicate that a form is given to them by the firm for union membership.

   The personnel section at the firm makes the transaction and dues are withheld. This places the responsibility of assignment upon the firm.

4. The firm discriminates against Negroes on the extra work list with respect to the seniority rules and job assignment. The investigation showed that:

   a) The firm denies the charges (Tab E-2).

   b) The extra work list, selected at random dates, show that Negroes are called for Assorters jobs, Express Handlers and some Chauffeurs (Truck Driver) almost exclusively. The only other job category that Negroes are called into on some rare occasions is that of Checkers.

Exhibit 1 (To Complaint)

The list of jobs and their code number (Tab F-2), when compared with the extra work list (Tab F-1) shows many examples of senior Negroes being confined to one or two job categories. The agreement (Tab I) states that employees are to be called in the order of their seniority and the senior person given his choice of jobs *if he qualifies*. Negroes are not given this preference of jobs and, thereby, never qualify for positions where Negroes are not permitted to work.

Candidly the extra work list (Tab F-1) shows that on January 9, 1967, the two senior most employees are White, Winsett and Bailey. Winsett was called in to perform job number 51. This is the code for Telephone Operator (Tab F-2). Bailey was called in to work in the city office. The next person on the list is a Negro, McCulley, and he was called in as an Assorter. Following him is another Negro, McGaha, who was also called for the Assorter job.

Mullins, a white employee, was called next to fill a clerical position which is not coded on the work sheet. Four white employees follow and all were assigned duties other than assorter. Following these four is a Negro, Boyd, who was called in as an Assorter. On this date, only one white employee was called in as an assorter. His name is Evans and he is eleventh in the

Exhibit 1 (To Complaint)

order of seniority. Only one Negro was called in as a chauffeur, Hampton, who appears twentieth in the order of seniority (Tab F-1 pages 1-2-3).

All of the entries on the extra work list show the same pattern from January 9, 1967, thru April 26, 1967 (Tab F-1).

c) The seniority roster of all employees at the plant shows a history of discrimination. White employees seniority dates from 1917 and the senior Negro at the plant was hired in 1944. He is still an Assorter. There are no Assorters under him until the next two Negro names are reached (Tab F-2, page 5).

d) The effects of this manner of job assignment is demonstrated clearly in the case of Charging Party, Aaron Kern, Kern claims that white employees were "passed around" him because of job classifications he was not permitted to hold. He said that this resulted in his seniority being displaced behind the white employees who were actually junior to him (Tab D-4). Kern was hired on August 13, 1964. His seniority date is December 6, 1965. (The seniority date is the date on which an employee is accepted off the extra list to a permanent position). Warren, a white employee, was hired on February 11, 1965, yet, he has a seniority date of November 29, 1965, which places him above Kern in the order of seniority because he

was able to accept a position before Kern. Evans, another white employee, was also placed above Kern (Tab F-2, page 7).

Even more demonstrative of this situation is the case of Noble Boyd, a Charging Party. Boyd was employed on September 12, 1964, and now holds seniority below three white employees who were hired on November 25, 1964, November 12, 1964, and September 27, 1964, respectively (Tab F-2, page 7).

The white employees involved in the above situation are Wright, Maxey, Johnson, Evans and Warren. Maxey is currently a Relief Foreman—Money Clerk, and Warren is a Foreman—Money Clerk (Tab F-10), positions that Negroes have never held.

Of the Two Negroes, Kern is now an Assorter (Tab F-9) and Boyd is an Assorter who works as a relief Chauffeur (Tab F-8).

B. Willie Johnson alleges that:

1. The firm employs dual standards, based on race, for conditions of employment and disciplinary action. The investigation showed that:

   a) The firm denies the allegations (Tabs E-1 & E-2)

   b) The firm does employ dual standards for conditions of employment as concluded in part A above.

Exhibit 1 (To Complaint)

c) In conversation with the Charging Parties, the investigator requested names of white employees who might be classified as "bad actors" or employees who were problematical with respect to discipline. The names provided were J. B. Smith, V. B. Alderson, L. H. Childress, J. C. Limbaugh and J. H. Martingals. This was done for comparative purposes with Willie Johnson. J. B. Smith's record is as follows: (Tab F-7).

Date	*Violation*	*Penalty*
3/18/58	Damaged vehicle	5 demerits
2/26/62	Damaged vehicle	10 demerits
3/26/62	Failed to lock truck	10 demerits
7/13/63	Failed to value shipment	10 demerits
9/27/64	Damaged vehicle	10 demerits
8/ 5/65	Damaged vehicle	15 demerits

J. H. Childress (Tab F-6) record is as follows:

9/ 6/63	Damaged vehicle	10 demerits

J. C. Limbough's (Tab F-5) record is as follows:

12/ 7/66	Insubordination & Damaged vehicle	20 demerits
12/29/66	Absent without permission	15 demerits

Exhibit 1 (To Complaint)

There were no disciplinary actions taken against V. B. Anderson and J. H. Martindale, according to the Respondent (Tab F-4).

Willie Johnson's record is as follows: (Tab F-3)

Date	*Violation*	*Penalty*
8/11/66	Violation of rules 59 & 64 (Absence without permission & failure to follow instructions)	Six days Suspension
2/21/67	Damaged vehicle	20 demerits
3/30/67	Damaged utility pole	20 demerits
6/22/67	Violation of Rule 64 (Insubordination)	20 demerits and resignation

It is pointed out that J. B. Smith had a record of damaging vehicles on four occasions which resulted in penalties of from five to fifteen demerits. Johnson received no less than twenty demerits for this infraction. Childress, another white driver, received 10 demerits for the same infraction. Limbaugh committed *identical* infractions with Johnson. Both Limbaugh and Johnson were charged with insubordination. Limbaugh received 20 demerits and Johnson was terminated. Limbaugh was charged with

Exhibit 1 (To Complaint)

absence without permission and drew 15 demerits. Johnson was suspended for six days for the same infraction. Johnson's infraction was incorporated into two charges, in that he failed to follow instructions (Insubordination, rule 64) by not notifying his foreman of an intended absence which is a violation of rule 59 (Tab H-2). Limbaugh's infraction was not compounded in this manner.

d) By admission of the Respondent, Johnson was required to sign an undated resignation form (Tab E-1) on the date of his first infraction of the company's rules (Tab G-1). The form was executed a year later when he was charged with insubordination. Thus, the notation of "resigned" appearing on Johnson's record (Tab F-3) is, in effect, termination.

e) Respondent officials stated that insubordination is automatic termination (Tabs E-1, E2, E-5, E-7). Apparently this does not apply to white employees with the same charge as is indicated on Limbaugh's record. (Tab F-5)

2. Willie Johnson also alleged that the firm required him to sign an undated resignation form a year before it was executed. The investigation showed that:

a) By admission of the Respondent (Tab E-1) and as stated above under Section 1, part

e, such requirements were made of the charging party.

b) The firm produced records to show that other such forms are on file against Aaron Kern, a Negro, and J. B. Smith, a white employee (Tab F-12). However, as stated above in this report, there is evidence that leads to the conclusion that disciplinary action is taken more severely against Negroes. The firm did not produce evidence that the form has been executed against white employees as it was in Johnson's case. Too, in Johnson's case, the form was executed against him as alleged.

c) William Worsham, Thomas Thornton and James Oliver alleged that they were terminated by the Respondent because they are Negroes. The investigation showed that:

1. William Worsham, according to the Respondent, was terminated under the provisions of the national contract which, they said, states that, "an employee must comply with the wishes of the person he is employed under." (Tab E-2)

2. The firm's manager, Steward, did not recall why Worsham was fired. (Tab E-1). This bears out Worsham's statement that, "Each supervisor I approached told me they didn't know why (I was terminated). This included Mr. A. A. Steward, the manager, who told me

Exhibit 1 (To Complaint)

that a lot of things goes out over his signature that he knows nothing of." (Tab D)

Superintendent Fergerson stated that he didn't know why Worsham was fired (Tab E-5) although it was Hall, the Division Operation Manager, who stated that Worsham was terminated under the terms of the national contract. Hall further stated that many employees are terminated without being given a reason because of security regulations (Tab E-2). Hall read off a paragraph from the security regulations which states, "Do not inform employees that they are being discharged because of security reasons." (Tab F-14). Yet, Hall failed to state that Worsham was terminated for security reasons.

3. Worsham's records do not reflect any adverse work habits or security risk information (Tab F-15).

4. Information reported to the union states only that Worsham's application was not accepted (Tab F-13, page 1).

5. Foremen in Worsham's work area display little working knowledge of company policy on EEO. (Tab E-5, E-7).

6. Worsham's records contain a photograph of Worsham which represents, in effect, racial designation, and the records re-

flect that Worsham completed 2 years college and good references from previous employers (Tab F-15).

1. Thomas Thornton and James Oliver, according to the Respondent, were terminated because the Security Officer, Mr. Oslin, refused to approve them (Tab E-4).

2. Contact with Mr. Oslin produced information that he knew nothing about the charging parties nor of the MDTA Program they were a part of. He knew nothing of special security requirements of MDTA (Tab E-6).

3. Contact with the Memphis Police Department produced evidence that Oliver, while attending college at Lamar, was arrested for disorderly conduct on March 23, 1956. The charges were subsequently dropped on March 26, 1956 (Tab D-1).

4. Oliver passed the United States Postal Security measures and spent 3½ years working in the Post Office prior to his employment with REA and after the Lamar incident (Tab D-1).

5. Contact with the Memphis Police Department showed that Thomas Thornton was arrested on April 23, 1964, and charged with disorderly conduct and discharging a gun inside the city limits. The disorderly conduct charge was dismissed

on April 26, 1966 and he was fined $50.00 for shooting within the city limits (Tab D-1).

6. Thornton, after being discharged by REA, passed the Postal Security and went to work at the Memphis Post Office. He was still employed there at the time of the investigation (Tab D-1).

7. James Oliver's work record (Tab F-16) shows that a photograph was attached to his application, there are no adverse work habits noted; no security risk information; he scored high on the pre-employment test; received an honorable discharge from the U.S. Air Force, and spent one year in college as an elementary education major. He received good recommendations from previous employers.

8. The work record of Thomas Thornton shows a photograph was attached to his application; there are no adverse work habits noted; no indication of action by security officials; he received an honorable discharge from the U.S. Marines, and he completed one year of college at Tuskegee (Tab F-17).

9. Thornton claimed that his trouble began when he took exception to being called "boy" (Tab B-3, page 1 and Tab D-1). Steward, the manager for the Respon-

Exhibit 1 (To Complaint)

dent, continually refers to Negroes as Niggras. (Tab E-1). Brodie Bowen, Jr. (witness) stated that, "White employees of equal rank want Negroes to address them as "Mister". (Tab D-8). Charging Party Elliott (Tab D-5) makes the same statement. All of the charging parties and witnesses testified that Negroes are generally discriminated against and suffer abuses.

During the investigation, the Respondent mentioned that women are not considered for promotion to supervisor (Tab E-2). Too, women are employed in various laborers and operatives classifications by the firm in localities other than Memphis (Case Number CC-6-9-7919; N.O. 6-9-16). The respondent also stated that new hires are considered for employment as supervisors if they have the necessary qualifications.

Exhibit 2 (To Complaint)

February 17, 1972

Honorable Bailey Brown
Chief United States District Judge
Federal Building
Memphis, Tennessee

RE: Willie Johnson v. Railway Express Agency, Inc.
No. C-71-66

Dear Judge Brown:

Mr. Willie Johnson has contacted me regarding representation in the above-entitled case. As I understand the facts, Mr. Johnson's previous attorney was permitted to withdraw from this case and Mr. Johnson was given thirty (30) days within which to secure new counsel or the case would be dismissed.

Mr. Johnson has been unable to secure other counsel, and I am also unable to represent him because of the apparent discovery expense that would be involved. Nevertheless, I have agreed to seek financial support for Mr. Johnson's case and, if such support can be obtained, I would be willing to represent him.

Although I do not represent Mr. Johnson at this time, I have agreed to ask the court in his behalf to grant an additional thirty (30) days within which he can attempt to secure legal representation and so that I may assist him in this matter. I am therefore requesting on Mr. Johnson's

behalf that he be given thirty (30) additional days within which to secure counsel for representation in the above-entitled matter.

Very truly yours,

William E. Caldwell

WEC:pw

cc: Willie Johnson
4325 Loral Cove, Memphis, Tenn.

Exhibit 3 (To Complaint)

FEB 18, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
CIVIL No. C-71-66

WILLIE JOHNSON, JR.,

Plaintiff,

v.

RAILWAY EXPRESS AGENCY, INC., et al.,

Defendants.

ORDER DISMISSING ACTION WITHOUT PREJUDICE

In this cause, this Court heretofore appointed Robert Rose of the Memphis Bar to represent this plaintiff, as well as the plaintiff Thomas Thornton in C-71-2, which are EEOC claims by these plaintiffs against REA Express and others. Thereafter, after various proceedings in these matters, counsel for the plaintiffs appeared in court and stated that he had managed to obtain an offer of settlement from REA Express, that plaintiff Thornton had agreed to accept the settlement, but plaintiff Johnson was unwilling to do so. Counsel further stated to the Court that in all frankness, in view of the staleness of the claim and other reasons, he had strongly recommended these settlements, but had been unable to persuade plaintiff Johnson to accept. The cases were set for trial on February 2, 1972, and Mr.

Exhibit 3 (To Complaint)

Rose filed a motion on or about January 7, 1972 to be relieved as attorney for plaintiff Johnson, which the Court granted on January 14, 1972. On the latter date, the Clerk of this Court, under direction of the Court, wrote to plaintiff Johnson stating that Mr. Rose had been relieved, that the setting for trial on February 2, 1972 would have to be reset, and that plaintiff Johnson was allowed 30 days from that date to obtain other counsel or his case would be dismissed without prejudice. Since such 30 days have passed without plaintiff having obtained such counsel and so notifying the Clerk as he was directed, this cause should be dismissed without prejudice.

It is therefore ORDERED and ADJUDGED that this action be and the same is hereby dismissed without prejudice.

ENTER this 15th day of February, 1972.

BAILEY BROWN
Chief Judge

Exhibit 4 (To Complaint)

May 5, 1972

Honorable Bailey Brown
Chief United States District Judge
Federal Building
Memphis, Tennessee 38103

Re: Willie Johnson v.
Railway Express Agency, Inc.
No. C-71-66

Dear Judge Brown:

I wrote the Court on February 17, 1972 indicating that I was seeking financial support on behalf of Mr. Willie Johnson, plaintiff in the above-referenced case, with a view toward representing him in this matter if such financial support could be obtained. At the time of my letter, however, the Court had previously, on February 16, 1972, entered an order dismissing Mr. Johnson's action for failure to obtain legal representation, but without prejudice.

At the time of my letter of February 17, I immediately set about seeking to obtain financial support for Mr. Johnson's cause of action. The NAACP Legal Defense Fund has agreed to underwrite costs and expenses to carry on this litigation. I have, therefore, agreed to represent Mr. Johnson in the above-entitled cause, and ask that this letter be treated as an entry of appearance as attorneys for the plaintiff by myself and Mr. Ural Adams of this office.

Since issue is joined as between plaintiff and defendant REA, and since the Court dismissed the action without prejudice, it seems to us that the most efficient way to

Exhibit 4 (To Complaint)

proceed would be to reopen the case in its February 16, 1972 status. We, therefore, request that the order dismissing the action entered on February 16, 1972 be vacated, and that this cause of action be reinstated on the active docket of the Court.

If counsel for REA objects to our suggested procedure, or if the Court otherwise feels that this matter should be handled in a formal manner, we will file a motion in accordance with the foregoing.

Very truly yours,

William E. Caldwell

WEC:pw

cc: Saul C. Belz, Esq.
Attorney for Defendant
Hon. W. Lloyd Johnson, Clerk

Exhibit 5 (To Complaint)

8 May 1972

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

Mr. William E. Caldwell
Attorney at Law
525 Commerce Title Building
Memphis, Tennessee 38103

Re: Willie Johnson v. Railway Express Agency, Inc.
Civil No. C-71-66

Dear Mr. Caldwell:

I have your letter of May 5, 1972.

It appears to me that the proper way to handle this matter would be to file a new action since the old one has long since been dismissed.

Yours very truly,

/s/ BAILEY BROWN
Bailey Brown
Chief Judge

BB:asw

CC: Mr. Saul C. Belz
Mr. W. Lloyd Johnson, Clerk

Answer of REA Express, Inc.*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
No. C-72-183

[Title omitted in printing]

Comes now the defendant, REA Express, Inc. and files this its separate answer to the original complaint filed herein and would show the Court as follows:

1. The complaint fails to state a claim upon which relief can be granted against the defendant REA Express, Inc.

2. That with regard to the allegations of the complaint pertaining to any rights under statutes other than the Civil Rights Act of 1964, the same are barred by res judicata between the plaintiff and the defendants in this cause. That in a suit heretofore pending in the United States District Court for the Western District of Tennessee, Western Division, in which Willie Johnson, Jr., was plaintiff, and REA Express, Inc. and the other named defendants herein were defendants, Cause No. C-71-66, suit was brought under the Civil Rights Act of 1964 and 42 U.S.C. Sec. 1981, 1982 and 1983. Also, it was alleged in the above mentioned complaint that plaintiff was denied the opportunity to obtain supervisory training which the defendant REA Express, Inc. provided white employees.

* Effective June 1, 1970, defendant's corporate name was changed to REA Express, Inc.

That Cause No. C-71-66 was by this Court consolidated with Cause No. C-71-2 by the Court.

In the consolidated cause, it was, among other things adjudged and decreed by this Court that through the Honorable Chief Judge Bailey Brown in ruling upon a motion of summary judgment by all defendants, that

> "In so far as plaintiffs in both cases sue under Civil Rights Statutes other than the Civil Rights Act of 1964, such claims are dismissed for the reasons that there is no Federal statute of limitations governing these claims, that therefore the Tennessee Statute of limitations of one (1) year would apply, and both of these claims were barred by such statute at the time they were filed."

The Court then further decided with regard to the claim concerning supervisory training:

> "4. The motions of REA Express, Inc. for summary judgment with respect to the claim of dismissal for not giving plaintiff's supervisory training are granted on the grounds that from the undisputed facts plaintiffs have not shown any discrimination in this respect."

The above mentioned judgment stands unreversed and unmodified and in full force and effect, and the matters and things above set forth which were determined, adjudged and decreed in that judgment were and are res judicata between the plaintiff and the defendants in this cause.

3. The Court lacks jurisdiction of the subject matter of the complaint by reason of the fact that this action

was not brought within thirty days after plaintiff was notified of his right to sue as required by Section 706 (e) of the Civil Rights Act of 1964, nor was this action brought within thirty days of the dismissal without prejudice of plaintiff's previously filed suit in Cause No. C-71-66, which cause was dismissed without prejudice on the 16th day of February, 1972. That the instant suit was not filed until May 31, 1972, in excess of 100 days after the dismissal of previous suit. That there is no applicable tolling provision or saving statute which would allow the refiling of this suit in such an untimely manner.

4. REA Express, Inc. admits the allegations contained in Paragraph 1 of the complaint.

5. REA Express, Inc. admits the allegations contained in Paragraph II of the complaint as to the nature of the proceeding, but denies that it is guilty of any acts which would entitle plaintiff to the relief sought.

6. REA Express, Inc. admits the allegations contained in Paragraph III of the complaint.

7. REA Express, Inc., is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of the complaint.

8. REA Express, Inc. denies each and every allegation of Paragraph V of the complaint except that plaintiff was employed by REA Express, Inc. which it admits. REA Express, Inc. relies upon its defense of res judicata as set forth in Paragraph 2 of this its answer, with regard to the allegations of Paragraph V concerning supervisory training.

9. REA Express, Inc. is without knowledge or information sufficient to form a belief of the allegations of Paragraph VI of the complaint.

10. REA Express, Inc. admits the allegations of Paragraph VII of the complaint, except that it denies the validity of the findings of the EEOC investigator.

11. REA Express, Inc. admits the allegations of paragraph VIII (A) to the extent that they allege that on or about January 15, 1971, plaintiff received a "notice of right to sue" letter from the EEOC. REA Express, Inc. is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph VIII (A) of the complaint.

12. REA Express, Inc. admits the allegations of paragraph VIII (B) of the Complaint to the extent that they allege that on February 12, 1971, a notice of right to sue was filed and treated as a complaint on paupers oath and docketed as case No. C-71-66. REA Express, Inc. further admits that on March 18, 1971, a "supplemental complaint" was filed on plaintiff's behalf by his Court appointed attorney and that answers were filed by the defendants in that suit. REA Express, Inc. admits the remaining allegations of paragraph VIII (B).

13. REA Express, Inc. admits the allegations of paragraph VIII (C) of the complaint.

14. REA Express, Inc. admits the allegations of paragraph VIII (D) and VIII (E) of the complaint.

15. REA Express, nc. admits with regard to the allegations of paragraph VIII (F) of the complaint that settlement of this case was discussed with adverse counsel, but

that no settlement was reached. REA Express, Inc. is without knowledge or information sufficient to form a belief as to the details of plaintiff's refusal to accept any settlement offer or the attitude of his attorney. REA Express, Inc. is without knowledge or information sufficient to form a belief as to the reasons for plaintiff's attorney's withdrawal from the case other than those reasons set forth in his motion to withdraw which is a part of the record in Cause C-71-66.

16. REA Express, Inc. admits the allegations of paragraph VIII (G) of the complaint.

17. REA Express, Inc. is without knowledge or information sufficient to form a belief as to the allegations of paragraph VIII (H) of the complaint concerning plaintiff's efforts to obtain representation or the diligence of counsel's efforts to obtain representation for the plaintiff. REA Express, Inc. admits that letters were written to the Court concerning Cause No. C-71-66 on February 17, 1972 and on May 5, 1972.

18. REA Express, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article IX of the complaint.

19. REA Express, Inc. admits the allegations of paragraph X of the complaint except that it denies that the plaintiff has suffered or is suffering irreparable injury or any form of injury as a result of its actions.

20. REA Express, Inc. denies the allegations of paragraph XI of the complaint.

All other allegations of the complaint which have not heretofore been admitted or denied or otherwise explained, are hereby denied.

Answer of REA Express, Inc.

Now, having fully answered, defendant, REA Express, Inc., prays judgment in its favor together with its costs.

.....

Burch, Porter & Johnson,
Attorneys for Defendant
REA Express, Inc.
130 North Court
Memphis, Tennessee

Motion of Defendants Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks to Dismiss the Complaint or in the Alternative to Grant Said Defendants Summary Judgment

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-72-183

[Title omitted in printing]

Now come the defendants Brotherhood of Railway, Airline and Steamship Clerks Tri-State Local and Lily of the Valley Local (BRAC Locals) to move this Court to dismiss the complaint in the above-entitled case, or in the alternative to grant said defendants summary judgment on the grounds that the Court's Order of June 14, 1971, in the case of Willie Johnson, Jr. v. REA Express, Inc., Brotherhood of Railway Clerks Tri-State Local and Lily of the Valley Local (Civil Action No. C-71-66), (1) granting the BRAC Locals summary judgment on the complaint based on Title VII of the Civil Rights Act of 1964 on the grounds that the undisputed facts showed that plaintiff Johnson had no grounds for relief against the BRAC Locals under that statute and (2) granting the motion of the BRAC Locals to dismiss the claims of the plaintiff under civil rights statutes other than Title VII of the Civil Rights Act of 1964, on the grounds that such claims were barred by the Tennessee State of Limitations, is *res*

judicata with respect to the claims asserted in the present complaint and that the claims in the present complaint are barred by the Court's Order of June 14, 1971, which is final and binding with respect to such claims. This motion is based upon the complaint in the present case and the record in the prior case identified as C-71-66. There is attached to the present motion the pertinent documents from the prior case and a memorandum of points and authorities in support of this motion.

Respectfully submitted,

/s/ James L. Highsaw
James L. Highsaw
1015 18th Street, N.W.
Washington, D.C. 20036

/s/ George E. Morrow
George E. Morrow
750 Union Planters National
Bank Bldg.
Memphis, Tennessee 38103

Attorneys for Defendants BRAC
Locals

Of Counsel:

Highsaw & Mahoney
1015 18th Street, N.W.
Washington, D.C. 20036

Martin, Tate, Morrow & Marston, P.C.
705 Union Planters National Bank Bldg.
Memphis, Tennessee 38103

July 25, 1972

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-71-66

Filed, March 18, 1973,

District Court, Western District of Tennessee

WILLIE JOHNSON, JR.,

Plaintiff,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL, and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

SUPPLEMENTAL COMPLAINT

I.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1343 (4) and 42 U.S.C. Section 2000e-5(f). This is a suit in equity authorized and instituted pursuant to Title VII of the Act known as the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq., and 42 U.S.C. Sections 1981, 1982, 1983 and 1988. The jurisdiction of this court is invoked to secure protection of and to redress the deprivation of rights secured by (a) Title VII of the Act known as the Civil Rights Act of 1964, 42 U.S.C. Sections

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

2000e, et seq., providing for injunctive and other relief against racial discrimination in employment, and (b) 42 U.S.C. Sections 1981, 1982 and 1983, providing for equal rights of citizens and all persons within the jurisdiction of the United States.

II.

This is a proceeding for preliminary and permanent injunction restraining defendants from maintaining a policy, practice, custom or usage of withholding, denying or attempting to withhold or deny, and depriving or attempting to deprive or otherwise interfering with the rights of plaintiff and other Negro persons similarly situated to equal employment opportunities at Railway Express Agency, Inc., Memphis, Tennessee, and equal labor representation by Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local, without discrimination on grounds of race or color.

III.

Plaintiff is a Negro citizen of the United States, residing in the State of Tennessee. The defendant, Railway Express Agency, Inc. is a corporation doing business in the State of Tennessee, and City of Memphis, and is an employer within the meaning of 42 U.S.C. Section 2000e(b) in that it is engaged in industry affecting interstate commerce and employs more than twenty-five (25) persons.

IV.

Defendant, Brotherhood of Railway Clerks Lily of the Valley Local is an unincorporated association of produc-

tion workers employed at defendant, Railway Express Agency, Inc., and defendant, Brotherhood of Railway Clerks Tri-State Local is an unincorporated association of workers employed at defendant, Railway Express Agency, Inc. On behalf of its members, defendant Unions enter into collective bargaining agreements dealing with the terms and conditions of employment of persons employed at defendant, Railway Express Agency, Inc., in Memphis, Tennessee. The principal office of the Brotherhood of Railway Clerks Tri-State Local is 331 Radford Road, Memphis, Tennessee. The principal office of the Brotherhood of Railway Clerks Lily of the Valley Local is 1274 Effie Road, Memphis, Tennessee. The Unions are a labor organization within the meaning of 42 U.S.C. Section 2000e(d), and is engaged in industry affecting commerce within the meaning of 42 U.S.C. Section 2000(e).

V.

Plaintiff alleges that he was employed by Railway Express Agency, Inc. from the spring of 1964 until the spring of 1967. Plaintiff alleges that Railway Express Agency, Inc. follows a policy and practice of racial discrimination in that:

(1) Railway Express Agency, Inc. denies Negro employees equal promotion opportunities with white employees;

(2) Railway Express Agency, Inc., in conjunction with defendant Unions, assigns, reassigns, promotes and otherwise acts or fails to act in such a manner as to maintain a preexisting pattern of racial discrimination in employment.

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

Plaintiff further alleges that he was denied the opportunity to obtain supervisory training and promotion which the defendant Railway Express Agency, Inc. provides white employees.

VI.

Plaintiff alleges that he was a member of the Brotherhood of Railway Clerks Lily of the Valley Local, one of the defendant unions, and that he was denied membership in the Brotherhood of Railway Clerks Tri-State Local. Plaintiff alleges that the unions followed a policy, custom or practice of racial discrimination in that the unions fail to defend the rights of Negro members in the same manner it defends the rights of white members. Plaintiff further alleges that he was denied equal labor representation because of his race and that his termination of employment was occasioned by racial discrimination practices by defendant, Railway Express Agency, Inc.

VII.

Plaintiff filed timely charges with the Equal Employment Opportunity Commission alleging the discriminatory practices set forth herein. On the 18th day of January, 1971, a commission investigator recommended that the commission find reasonable cause to believe that defendant, Railway Express Agency, Inc., had discriminated against plaintiff in that the defendants had violated rights of the plaintiff guaranteed under Title VII of the Civil Rights Act of 1964 by failing to grant plaintiff opportunity for equal employment advancement and by failing to represent plaintiff in the same manner as it represents caucasian employees.

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

VIII.

Plaintiff filed timely charges with the Equal Employment Opportunity Commission alleging the discriminatory practices set forth herein. On January 18, 1971, a commission investigator recommended that the commission find reasonable cause to believe that the defendant unions and defendant Railway Express Agency, Inc. had discriminated against the plaintiff in the same manner as set forth in Paragraph VII.

IX.

Neither the State of Tennessee nor the City of Memphis has a law prohibiting the unlawful employment practices alleged herein.

X.

Plaintiff was notified by the commission that pursuant to Section 706(e) of the Civil Rights Act of 1964, he had thirty (30) days in which to institute a civil action in the appropriate United States District Court. Plaintiff is now suffering and will continue to suffer irreparable injury from the defendants' policy, custom, practice and usage as set forth herein.

XI.

Plaintiff alleges that he has no adequate and complete remedy at law to redress the wrongs alleged herein other than this suit for a permanent injunction. Plaintiff is now suffering and will continue to suffer irreparable injury from the defendants' policy, practice, custom and usage as set forth herein.

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

XII.

WHEREFORE, plaintiff prays that this court advance this case on the docket, ordering a speedy hearing at the earliest practicable date and cause this case to be in every way expedited and upon such hearing:

(1) Grant plaintiff preliminary and permanent injunction enjoining the defendants, Railway Express Agency, Inc., Brotherhood of Railway Clerks Tri-State Local, and Brotherhood of Railway Clerks Lily of the Valley Local, their agents, successors, employees, attorneys and those acting in concert with them at their direction from continuing and maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering, individually and/or jointly, with the rights of the plaintiffs as provided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq.

(2) Grant the plaintiff preliminary and permanent injunction enjoining the defendants, Railway Express Agency, Inc., Brotherhood of Railway Clerks Tri-State Local, and Brotherhood of Railway Clerks Lily of the Valley Local, their agents, successors, employees, attorneys and those acting in concert with them at their direction from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering, individually and/or jointly, with the rights of the plaintiff to enjoy equal employment for advancement or training as directed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq.

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

(3) Grant the plaintiff judgment in the amount of back pay to which he would have been entitled including all raises, bonuses and fringe benefits to which he would have been entitled had the employment not been terminated.

(4) Award plaintiff the costs of this action, together with reasonable attorney's fees as provided in Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e(5)(k).

(5) Plaintiff prays that this court grant such other, futrher, additional and/or alternative relief as the needs of justice require.

Respectfully submitted,

.....

Robert E. Rose
Matthews, Thompson & Rose
745 Commerce Title Building
Memphis, Tennessee
Attorney for Plaintiff

Appendix B
(To Motion of Defendants Tri-State Local, etc.)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-71-66

[Title omitted in printing]

ANSWER OF DEFENDANTS TRI-STATE LOCAL AND LILY OF THE VALLEY LOCAL OF THE BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS TO SUPPLEMENTAL COMPLAINT

Now come the Tri-State Local and the Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC Locals) to answer the supplemental complaint in the above-entitled cause as follows:

FIRST DEFENSE

The Court lacks jurisdiction of the subject matter of the supplemental complaint with respect to the defendants BRAC Locals insofar as the supplemental complaint purports to be based upon Civil Rights Act of 1964 for the following reasons:

1. The defendants BRAC Locals were never served with any charges against such defendants filed with the Federal Equal Employment Opportunity Commission, as required by Section 706(a) of the Civil Rights Act of 1964.

Appendix B
(To Motion of Defendants Tri-State Local, etc.)

2. Prior to the institution of this suit, there was no real endeavor by the Federal Equal Employment Opportunity Commission to conciliate with the defendants BRAC Locals the matter complained of as required by the Civil Rights Act of 1964.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of the supplemental complaint insofar as that complaint is based upon Federal statutory provisions other than the Civil Rights Act of 1964 in that such provisions are not applicable to the subject matter of the supplemental complaint and the plaintiff has not exhausted his internal union remedies within BRAC as a condition precedent to his suit as required by Federal law. In addition, the matter in controversy does not exceed the sum or value of $10,000.00, exclusive of interest and costs, as required by Title 28, Section 1331, of the United States Code.

THIRD DEFENSE

The Court does not have jurisdiction of the claims set forth in the supplemental complaint insofar as such jurisdiction is based upon Federal statutes other than the Civil Rights Act of 1964 because exclusive jurisdiction over such claims rests with the National Railroad Adjustment Board pursuant to Section 3 of the Railway Labor Act, as amended (45 U.S.C.A., Section 153).

FOURTH DEFENSE

Insofar as the supplemental complaint seeks to assert a cause of action based upon Federal statutes other than the Civil Rights Act of 1964, such actions are barred by

Appendix B
(To Motion of Defendants Tri-State Local, etc.)

applicable statutes of limitations including, but not limited to, Tennessee Code Annotated, Title 28, Section 304, and Title 28, Section 305.

FIFTH DEFENSE

The supplemental complaint fails to state a claim upon which relief can be granted against defendants BRAC Locals.

SIXTH DEFENSE

The Court lacks jurisdiction of the subject matter of the supplemental complaint by reason of the fact that this action was not brought within 30 days after plaintiff was notified of his right to sue as required by Section 706(e) of the Civil Rights Act of 1964.

SEVENTH DEFENSE

The Court lacks jurisdiction to grant the relief prayed for by the plaintiff by reason of the provisions of Section 706(g) of the Civil Rights Act of 1964.

EIGHTH DEFENSE

The defendants BRAC Locals admit or deny the allegations of the supplemental complaint as follows:

1. The BRAC Locals deny the allegations of paragraph I of the supplemental complaint.

2. The BRAC Locals deny the allegations of paragraph II of the supplemental complaint.

3. The BRAC Locals admit the allegations of paragraph III of the supplemental complaint.

Appendix B
(To Motion of Defendants Tri-State Local, etc.)

4. The BRAC Locals admit that they are unincorporated associations who have members employed by Railway Express Agency and that they have offices in Memphis, Tennessee. Except to the extent thus specifically admitted, the BRAC Locals deny the allegations of paragraph IV of the supplemental complaint.

5. The BRAC Locals state that they are without knowledge sufficient to admit or deny the averments of paragraph V of the supplemental complaint with respect to plaintiff's alleged employment with Railway Express Agency. The BRAC Locals deny all of the remaining allegations of paragraph V of the supplemental complaint.

6. The BRAC Locals deny the allegations of paragraph VI of the supplemental complaint.

7. The BRAC Locals deny the allegations of paragraph VII of the supplemental complaint.

8. The BRAC Locals deny the allegations of paragraph VIII of the supplemental complaint.

9. Paragraph IX of the supplemental complaint constitutes a legal conclusion to which the BRAC Locals are not required to plead.

10. The BRAC Locals state that they are without knowledge sufficient to admit or deny the averments of paragraph X of the supplemental complaint and therefore deny such allegations.

11. The BRAC Locals deny the allegations of paragraph XI of the supplemental complaint.

Appendix B
(To Motion of Defendants Tri-State Local, etc.)

WHEREFORE, the BRAC Locals pray as follows:

1. That the Court dismiss the supplemental complaint or grant the defendants BRAC Locals judgment with respect thereto.

2. That the Court award defendants costs of this action together with reasonable attorney's fee.

3. That the Court grant defendants BRAC Locals such other, further, additional and/or alternative relief as may be appropriate in the premises.

/s/ JAMES L. HIGHSAW
James L. Highsaw
Highsaw & Mahoney
1015 Eighteenth Street, N. W.
Washington, D. C. 20036

/s/ GEORGE MORROW
George Morrow
Martin, Tate and Morrow
Union Planters National Bank Bldg.
Memphis, Tennessee 38103
Attorneys for Defendant BRAC Tri-State Local and Lily of the Valley Local

Of Counsel:

William J. Donlon
6300 River Road
Rosemont, Illnois 60018

April 4, 1971

Appendix C
(To Motion of Defendants Tri-State Local, etc.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
No. C-71-66

[Title omitted in printing]

MOTION OF DEFENDANTS TRI-STATE LOCAL AND LILY OF THE VALLEY LOCAL OF THE BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS TO DISMISS THE SUPPLEMENTAL COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Now come the defendants in the above-entitled case, Tri-State Local of the Brotherhood of Railway and Airline Clerks and Lily of the Valley Local of said Brotherhood (BRAC Locals), to move the Court to dismiss the supplemental complaint upon the ground that the Court does not have jurisdiction of the subject matter of the complaint. Insofar as the jurisdiction of the complaint is based upon Federal statutes other than the Civil Rights Act of 1964, the motion is based upon the additional ground that the supplemental complaint is barred by the applicable Tennessee Statutes of Limitations; failure of the plaintiff to utilize administrative and union remedies as a condition precedent to a suit based on such statutes; and the fact that plaintiff has no independent cause of action under such other statutes.

Appendix C
(To Motion of Defendants Tri-State Local, etc.)

There are attached hereto in support of this motion an affidavit of Mr. William J. Donlon, General Counsel of the Brotherhood of Railway and Airline Clerks, and a legal memorandum of points and authorities.

Respectfully submitted,

James L. Highsaw
Highsaw & Mahoney
Suite 506
1015 Eighteenth Street, N. W.
Washington, D. C. 20036

George Morrow
Martin, Tate & Morrow
Union Planters National Bank Bldg.
Memphis, Tennessee 38103
Attorneys for Defendants BRAC Tri-State Local and Lily of the Valley Local

Of Counsel:

William J. Donlon
6300 River Road
Rosemont, Illinois 60018

April 30, 1971

Affidavit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
CIVIL ACTION NO. C-71-66

WILLIE JOHNSON, JR.,

Plaintiff,

v.

RAILWAY EXPRESS AGENCY, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendant.

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.:*

William J. Donlon, being duly sworn deposes and says as follows:

1. That he is General Counsel of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as BRAC); that his office is in the Headquarters of BRAC located in the O'Hare International Transportation Center at 6300 River Road, Rosemont, Illinois.

2. That he appeared as Counsel of record in proceedings instituted by Willie Johnson, Jr., against REA Express,

Inc., and Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local, before the Equal Employment Opportunity Commission, designated case No. 7-6-822EU.

3. That on January 19, 1971 Affiant received notice that Willie Johnson, Jr., had made written demand and the Equal Employment Opportunity Commission had issued pursuant to Section 706(e) of Title 7 of the Civil Rights Act of 1964 and the Equal Employment Opportunity Commission's Procedural Regulations Section 1601.25 and 1601.25a(b), a notice of Charging Parties' right to initiate suit in the appropriate Federal District Court. Copy of Mr. Charles A. Dixon's letter of January 15, 1971 is attached and designated as Exhibit "A". Copy of Notice of Right to Sue sent to Mr. Johnson, dated January 15, 1971, is attached and designated as Exhibit "B".

4. Affiant requested further information from Equal Employment Opportunity Commission relative to date on which Mr. Willie Johnson, Jr. received his Notice dated January 18, 1971 of his right to initiate a suit. Affiant was advised by Mr. Charles A. Dixon, Deputy Director, in a letter dated March 2, 1971, that Mr. Willie Johnson, Jr. received his notice January 18, 1971. Copy of Mr. Dixon's letter is attached hereto and marked as Exhibit "C".

5. Affiant further states that he has read copy of complaint filed by Willie Johnson, Jr. in the above captioned case which indicates court filing on March 18, 1971 and is of the opinion and belief that said action was not com-

menced within the thirty day period prescribed by the statute.

/s/ WILLIAM J. DONLON

Subscribed and sworn to before me
this 2nd day of April, 1971.

/s/ HELEN M. WRIGHT
Helen M. Wright
Notary Public, Cook County, Illinois
My Commission expired March 9, 1974

Appendix D

(To Motion of Defendants Tri-State Local, etc.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
CIVIL ACTION NO. C-71-66

[Title omitted in printing]

INTERROGATORIES NO. 1 OF DEFENDANTS TRI-STATE LOCAL AND LILY OF THE VALLEY LOCAL OF THE BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS TO PLAINTIFF WILLIE JOHNSON, JR.

Now come the defendants Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC Locals) and request the plaintiff Willie Johnson, Jr., pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure, to answer the following interrogatories fully in writing, under oath, and, except where otherwise indicated, separately with respect to each such defendant, and to serve a copy of the answers upon the undersigned counsel for said defendants within fifteen (15) days after service hereof.

These interrogatories shall be deemed continuing and supplemental answers shall be required as plaintiff, directly or indirectly, obtains further information sought herein between the time answers are served to these interrogatories and the time of trial.

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

1. State the specific date on which the plaintiff began work for Railway Express Agency, Inc., as alleged in paragraph V of the supplemental complaint.

2. State the job or position held by plaintiff when he began work with Railway Express Agency, Inc., as alleged in paragraph V of the supplemental complaint.

3. State specifically the occasion or occasions upon which the defendant unions failed to defend the rights of negro members in the same manner they defended the rights of white members as alleged in paragraph VI giving the date of each occasion and the names of the members involved.

4. State the particular action or failure to act which constituted a denial to the plaintiff of equal representation because of his rights, as alleged in paragraph VI, including the dates and persons involved.

5. State whether the termination of plaintiff's employment with Railway Express Agency, Inc. was voluntary on his part or was the result of a discharge by his employer if alleged in paragraph VI.

6. If plaintiff was discharged from employment with Rialway Express Agency, Inc., then state the date of termination, whether the termination was done orally or in writing, if the latter the date of the communication and the name of the person who signed same.

7. Does plaintiff have knowledge of any by-law or other rule or regulation of the defendant Lily of the Valley Local limiting the membership of that local to Negroes?

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

8. If the answer to question no. 7 above is in the affirmative, set forth specifically the by-law or rule to which plaintiff refers.

9. Does plaintiff have knowledge of any by-law or rule of defendant Tri-State Local limiting the membership of that local to white persons?

10. If the answer to question no. 9 above is in the affirmative, set forth the by-law or rule to which plaintiff refers.

11. Set forth the approximate date upon which plaintiff became a member of the defendant Lily of the Valley Local.

12. Is plaintiff still a member of the Lily of the Valley Local?

13. If the answer to question no. 12 is "No", set forth the date upon which plaintiff ceased to be a member of the Lily of the Valley Local.

14. If plaintiff is no longer a member of the Lily of the Valley Local, did plaintiff resign his membership in such local?

15. Has plaintiff ever appied for membership in any other BRAC Local?

16. If the answer to question no. 15 above is "Yes", furnish the following information:

(a) The name of the BRAC Local to which plaintiff applied for membership.

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

(b) The approximate date upon which such application was made.

17. Has palintiff ever filed a complaint with BRAC concerning the alleged segregation of membership of the Lily of the Valley Local?

18. If the answer to question no. 17 above is in the affirmative, furnish the following information:

(a) The approximate date of such complaint.

(b) The individual to whom such complaint was made.

(c) Whether the complaint was made orally or in writing.

19. Furnish the following information with respect to the collective bargaining agreements which the defendants BRAC Locals have allegedly entered into with defendant Railway Express Agency, Inc., as alleged in paragraph IV of the supplemental complaint:

(a) List each such agreement, including the approximate date thereof.

(b) Name the parties to each such agreement.

20. Set forth the names of white employees provided training for supervisory positions with Railway Express as alleged in paragraph V of the supplemental complaint.

21. Did plaintiff ever request Railway Express to provide him with training toward a supervisory position with Railway Express?

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

22. If the answer to question no. 21 above is in the affirmative, furnish the following information:

(a) The name of the person to whom such request was made.

(b) The approximate date upon which such request was made.

(c) Whether such request was made orally or in writing.

(d) What response did plaintiff receive to such request.

(e) Was such response oral or in writing.

(f) The approximate date of such response.

23. Did plaintiff ever file a grievance with the Lily of the Valley Local or with BRAC alleging that he had been improperly denied an opportunity to train toward a supervisory position with Railway Express?

24. If the answer to question no. 23 above is in the affirmative, furnish the following information:

(a) The date upon which such grievance was filed.

(b) With whom such grievance was filed.

(c) Was such grievance oral or in writing.

25. Paragraph VII of the supplemental complaint alleges that plaintiff's rights as a member of the Lily of the Valley Local were not equal to those of white members of

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

BRAC. In connection with this allegation, furnish the following information:

(a) The specific rights as a member of BRAC to to which plaintiff refers in paragraph VII of the supplemental complaint.

(b) The rights of plaintiff with respect to the matters so referred to.

(c) The claimed rights of white members of BRAC with respect to the matters so referred to.

26. Paragraph VI of the supplemental complaint alleges that plaintiff has been denied equal representation because of his race. With respect to this allegation, furnish the following information:

(a) Set forth specifically the matters with respect to which plaintiff refers claiming he has been denied equal representation.

27. Did plaintiff ever file a grievance with the Lily of the Valley Local claiming that he had been denied equal representation because of race?

28. If the answer to question no. 27 above is in the affirmative, furnish the following information:

(a) The date upon which such grievance was filed.

(b) The person with whom such grievance was filed.

(c) Whether such grievance was oral or in writing.

29. State the date upon which plaintiff was notified by the Federal Equal Employment Opportunity Commission

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

that he had 30 days in which to institute a civil action in an appropriate United States District Court as alleged in paragraph X of the supplemental complaint.

30. Has plaintiff been employed by any other employer since the termination of his employment by Railway Express as alleged in paragraph V of the supplemental complaint?

31. If the answer to question no. 30 above is in the affirmative, set forth the following information with respect thereto:

(a) The name of each such employer.

(b) The approximate dates upon which plaintiff was employed by each such employer.

(c) If there has been more than one employer, the positions plaintiff held with each such employer and his approximate compensation with each such employer.

(d) Was plaintiff fired by any such employer. If so, what was the reason given therefor?

32. Furnish the address at which plaintiff resides in the State of Tennessee as alleged in paragraph III of the supplemental complaint.

33. What is plaintiff's age?

34. Set forth plaintiff's education.

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

35. Did plaintiff hold a bulletined position with Railway Express?

36. If the answer to question no. 35 is "No", did plaintiff ever file a bid with Railway Express for a bulletined position?

37. If the answer to question no. 35 above is "Yes", furnish the following information:

(a) The job for which plaintiff bid.

(b) The date upon which such bid was filed.

38. Did plaintiff ever appear on a seniority roster of employees of Railway Express?

39. State the specific acts which plaintiff requests the Court to enjoin the defendants BRAC Locals from performing under the prayed for relief contained in paragraph XII(2) of the supplemental complaint.

40. State the specific acts which plaintiff seeks to have the Court enjoin the defendants BRAC Locals from performing in the prayer for relief contained in paragraph XII(p) of the supplemental complaint.

41. State the specific position with Railway Express to which plaintiff claims he should be reinstated as prayed for in paragraph XII(3) of the supplemental complaint.

42. Set forth the amount of back pay which plaintiff claims he should be awarded with respect to this position.

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

43. List the names and addresses of any persons whom plaintiff knows to have any knowledge of any of the matters set forth in the supplemental complaint.

Respectfully submitted,

/s/ James L. Highsaw
James L. Highsaw
Highsaw & Mahoney
1015 Eighteenth Street, N. W.
Washington, D. C. 20036

Of Counsel:

William J. Donlon
6300 River Road
Rosemont, Illinois 60018

/s/ George E. Morrow
George E. Morrow
Martin, Tate, Morrow & Marston, P. C.
Union Planters National Bank Bldg.
Memphis, Tennessee 38103
Attorneys for Defendants BRAC Tri-State Local and Lily of the Valley Local

May 11, 1971

Appendix E

(To Motion of Defendants Tri-State Local, etc.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
CIVIL ACTION NO. C-71-66

[Title omitted in printing]

ANSWER TO INTERROGATORIES NO. 1 OF DEFENDANTS TRI-STATE LOCAL AND LILY OF THE VALLEY LOCAL OF THE BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS TO PLAINTIFF WILLIE JOHNSON, JR.

1. Plaintiff does not recall exact date he began work for Railway Express Agency, Inc. but states that it was approximately May or June of 1964.

2. Plaintiff began work as a handler.

3. Plaintiff does not know specifically the dates and the names of all persons involved but recalls generally that all Negro employees were referred to Lily of the Valley Local and the Tri-State Local would not represent the Negro employees.

4. Plaintiff states that the Lily of the Valley Local was not even for Railway Express employees in his category but was in fact a union for mail employees.

Appendix E
(To Motion of Defendants Tri-State Local, etc.)

5. Plaintiff's employment was the result of a discharge by his employer.

6. Plaintiff does not recall the exact date of termination, he believes the termination was in writing because he had been given a post dated resignation which he executed prior to termination.

7. No.

8. Not applicable.

9. Plaintiff has no knowledge.

10. Plaintiff has no knowledge.

11. Plaintiff joined the union approximately thirty (30) days after being hired by Railway Express.

12. No.

13. Plaintiff does not recall date.

14. No.

15. No.

16. Not applicable.

17. No formal complaint was ever filed before filling suit.

18. Not applicable.

19. Plaintiff has no personal knowledge.

Appendix E
(To Motion of Defendants Tri-State Local, etc.)

20. Plaintiff has no knowledge.

21. No.

22. Not applicable.

23. Plaintiff has filed no formal grievance.

24. Not applicable.

25. Plaintiff states that the dues were higher for the Negro employees in the Lily of the Valley Local than the dues were for the white employees in the Tri-State Local. Plaintiff further generally alleges that as a Negro employee the unions were not giving proper and diligent representations to their grievances.

26. Answer same as No. 25.

27. Plaintiff did not file a formal grievance.

28. Not applicable.

29. Plaintiff does not recall the exact date he received notice from the Federal Equal Employment Opportunity Commission but the date of notice for thirty (30) days in which to institute a civil action was January 15, 1971.

30. Yes.

31. Plaintiff has been employed by Kroger, Inc. since April of 1968 and prior to April of 1968 he had numerous part time jobs and is unable to recall the exact dates or names of employers for that period of time. Plaintiff is

Appendix E
(To Motion of Defendants Tri-State Local, etc.)

employed as an order puller with Kroger at the present time. Plaintiff has not been fired by any employer since leaving employment of the Railway Express Agency.

32. Plaintiff lives at 4325 Loral Cove.

33. Plaintiff's age is 33.

34. Plaintiff has completed high school education.

35. Yes.

36. Not applicable.

37. a) Driver.

b) Bid for one year on the above job before obtaining same.

38. Yes.

39. Plaintiff requests the Court to enjoin the defendants BRAC Locals from continuing the practice of discrimination in dues charged Negro and white employees; in failing to give grievances of Negro employees proper and diligent consideration; and failing to give Negro employees equal opportunity for advancement to supervisory positions.

41. Supervisor.

42. Plaintiff is unable to answer as he is not aware of any raises which may have been awarded since his termination with Railway Express or what the present rate of pay is for employees of Railway Express.

Appendix E
(To Motion of Defendants Tri-State Local, etc.)

43. Plaintiff does not at this time recall the names and addresses of persons who have any knowledge of the matter set forth in the supplemental complaint other than the name of Thomas Thornton.

Respectfully submitted,

Robert E. Rose
Attorney for plaintiff,
Willie Johnson, Jr.

Appendix G

(To Motion of Defendants Tri-State Local, etc.)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

Filed June 14, 1971

CIVIL C-71-2

THOMAS THORNTON,

Plaintiff,

v.

REA EXPRESS, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

—AND—

CIVIL C-71-66

WILLIE JOHNSON, JR.,

Plaintiff,

v.

REA EXPRESS, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

Appendix G
(To Motion of Defendants Tri-State Local, etc.)

ORDER WITH RESPECT TO MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT

Upon consideration, and after argument of counsel, it is hereby ORDERED:

1. Insofar as plaintiffs in both cases sue under Civil Rights statutes other than the Civil Rights Act of 1964, such claims are dismissed for the reasons that there is no Federal statute of limitations governing those claims, that therefore the Tennessee statute of limitations of one year would apply, and both of these claims were barred by such statute at the time they were filed.

2. The motions to dismiss in both cases on the ground that the thirty-day letter filed within the thirty-day period is not sufficient to satisfy the requirement that a complaint be filed within thirty days following the issuance of said letter are overruled. See opinion of Judge Harry W. Wellford, *Joeanna Beckum* v. *Tennessee Hotel,* (W.D. Tenn. 1971) attached hereto. Cf. *Rice* v. *Chrysler Corp.*, —— F.Supp. ——, 3 FEP Cases 436 (E.D. Mich. 1971).

3. The motion of the defendant Union locals for summary judgment will be granted on the grounds that from the undisputed facts plaintiffs have no grounds for relief against said Unions under the Civil Rights Act of 1964.

4. The motions of REA Express, Inc. for summary judgment with respect to the claim of dismissal for not giving plaintiffs supervisory training are granted on the ground that from the undisputed facts plaintiffs have not shown any discrimination in this respect.

Appendix G
(To Motion of Defendants Tri-State Local, etc.)

5. The motions of REA Express, Inc. for summary judgment with respect to the claim of both plaintiffs of discriminatory discharge and with respect to plaintiff Johnson's claim of denial of equal promotional opportunities and discrimination in job assignment be and the same are hereby denied.

ENTER this 14th day of June, 1971.

BAILEY BROWN
Chief Judge

(Illegible)

Motion of the Defendant Rea Express, Inc. to Dismiss the Complaint or in the Alternative to Grant Judgment

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-72-183

[Title omitted in printing]

Comes now the defendant, REA Express, Inc. and moves this Court to dismiss the Complaint in the above entitled cause, or in the alternative to grant said defendant summary judgment on the following grounds:

(1) That the Court lacks jurisdiction of the subject matter of the Complaint by reason of the fact that this action was not brought within 30 days after plaintiff was notified of his right to sue as required by Section 706(e) of the Civil Rights Act of 1964, nor was this action brought within thirty (30) days of the dismissal without prejudice of plaintiff's previously filed suit in Cause No. C-71-66, which cause was dismissed without prejudice on the 15th day of February, 1972. That the instant suit was not filed until May 31, 1972, in excess of 100 days after the dismissal of the previous suit. That there is no applicable tolling provision or saving statute which would allow the re-filing of this suit in such an untimely manner, and that this suit is barred by the limitation provided in the enabling Act.

(2) That your defendant is entitled to a summary judgment as to any claims of the plaintiff under Civil Rights

Statutes other than Title VII of the Civil Rights Act of 1964, and as to claims made under the allegations of paragraph V of the Complaint herein on the ground that such matters were decided by the United States District Court for the Western District of Tennessee, Western Division in Cause No. C-71-66 in a manner adverse to the plaintiff by order of the Court on June 14, 1971, and such matters are res adjudicata.

This motion is based upon the Complaint in the present cause, upon the motion of the defendants' Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lilly of the Valley Local in Cause No. C-72-183, and all documents of record in Cause No. C-71-66.

Respectfully submitted,

BURCH, PORTER & JOHNSON

/s/ By SAUL C. BELZ
Saul C. Belz

Amendment to Motion of Defendants Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks to Dismiss the Complaint or in the Alternative to Grant Said Defendants Summary Judgment

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-72-183

[Title omitted in printing]

Come now the defendants Brotherhood of Railway, Airline and Steamship Clerks Tri-State Local and Lily of the Valley Local (BRAC Locals) and amend the Motion heretofore filed in this cause on July 25, 1972 for the dismissal of the Complaint or for the granting of a Summary Judgment, as follows:

These defendants adopt and reiterate the grounds for dismissal of the Complaint or the granting of a Summary Judgment set forth in the Motion of the defendant REA Express, Inc., setting forth the absence of jurisdiction over the subject matter of the Complaint in this Court, by reason of the failure of the plaintiff to bring his action within the time provided in the governing statutes.

For said reason, in addition to those set forth in their earlier motion, these defendants pray that the cause be

dismissed as to them, or that the Court grant a Summary Judgment to these defendants.

Respectfully submitted,

James L. Highsaw
1015 18th Street N. W.
Washington, D. C. 20036

George E. Morrow
705 Union Planters National Bank Building
Memphis, Tennessee 38103

Attorneys for Defendants BRAC Locals

Of Counsel:

HIGHSAW & MAHONEY
1015 18th Street N. W.
Washington, D. C. 20036

MARTIN, TATE, MORROW & MARSTON, P.C.
705 Union Planters National Bank Bldg.
Memphis, Tennessee 38103

September 6, 1972

Order on Defendant Motions for Judgment

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-72-183

Filed, January 25, 1973, Clerk, U.S. District Court,

Western District of Tennessee

WILLIE JOHNSON, JR.,

Plaintiff,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL, and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

This is an action brought by a former employee of Railway Express Agency, Inc. (REA) against that carrier and two local lodges of the BRAC, i.e., the Tri-State Local and the Lily of the Valley Local (BRAC Locals) alleging violations of the civil rights of the plaintiff under federal statute. Jurisdiction is asserted pursuant to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A., Section 2000e, et seq.), the provisions of other federal statutes protecting civil rights set forth in 42 U.S.S.C., Sections 1981, 1982 and 1988, and the provisions of Title 28 of the United States Code, Section 1343. The complaint asks for injunctive relief, compensatory damages, and

the award of costs of the action together with reasonable attorneys' fees.

Paragraph VIII of the present complaint states that "this is the second complaint filed by plaintiff against defendants REA and Union Locals concerning the matters set forth herein and seeking the relief requested herein." Said paragraph VIII then goes on to recite the following facts with respect to the prior complaint:

> "On February 12, 1971, this Court entered orders appointing Robert E. Rose as attorney for plaintiff and allowing plaintiff's 'Notice of Right to Sue' Letter be filed and treated as a complaint on a pauper's oath, which documents were docketed as Civil No. C-71-66. Subsequently, on March 18, 1971, a 'Supplemental Complaint' was filed on plaintiff's behalf by his court-appointed attorney. Defendant REA filed its answer on March 29, 1971, and defendant Union Locals filed their answer on April 6, 1971. Thereafter, the case was set for trial on August 18, 1971. On April 30, 1971, defendants Union Locals filed a motion to dismiss or in the alternative for summary judgment, with supporting affidavits and memoranda of law. May 11, 1971, defendant Union Locals propounded 43 numbered interrogatories to plaintiff. June 3, 1971, defendant REA filed a motion to dismiss or in the alternative for summary judgment, along with supporting affidavits and memoranda of law. No memoranda or affidavits were ever filed on behalf of plaintiff in opposition to defendants' motions.
>
> On June 30, 1971, the Honorable Bailey Brown, Chief Judge of this Court, entered an order on defendants' motions, which: (1) dismissed plaintiff's claims insofar as they were based on statutes other

than Title VII of the Civil Rights Act of 1964; (2) granted summary judgment to defendant Union Locals; (3) granted summary judgment to defendant REA 'with respect to the claim of dismissal for not giving plaintiffs supervisory training', (4) denied defendant REA's motion with respect to plaintiff's charge of discriminatory discharge and plaintiff's claim of denial of equal promotion opportunities and discriminatory job assignments; (5) denied the defendants' motions to dismiss on the grounds that filing the 'Notice of Right to Sue' letter did not constitute the filing of a complaint within the time allowed. This order was a consolidated ruling in plaintiff's case and in No. C-71-2 (Thomas Thornton v. the same defendants)."

The complaint, with respect to prior history of this dispute, also sets out in substance that plaintiff's appointed counsel, Mr. Rose, failed to take discovery and to prepare the case for trial, and being dissatisfied with plaintiff's cause of action and his refusal to settle, was permitted by Judge Brown to withdraw as counsel (purportedly without notice to plaintiff) within a few weeks before the date fixed for trial. Plaintiff further asserts and the record bears out in the prior action that Judge Brown directed the Court Clerk to notify plaintiff that if he did not obtain another counsel within 30 days his claim would be dismissed without prejudice.

Plaintiff's present counsel after being contacted (for the second time) by plaintiff within the prescribed 30 day period wrote to Judge Brown within a day or two *after* this period had elapsed, requesting an additional 30 days for plaintiff to secure legal representation. The Court

had, however, on the 30th day (February 16, 1972) entered an order dismissing the case *without* prejudice. This action has been subsequently filed on May 31, 1972.

At no time did plaintiff Johnson appeal to the United States Court of Appeals for the Sixth Circuit the order of Judge Brown dated June 14, 1971, granting the BRAC Locals summary judgment with respect to the claims upon Title VII of the Civil Rights Act of 1964 and dismissing plaintiff Johnson's claims based upon other federal statutes.

Plaintiff's Claim Against Defendant Unions

This action clearly involves the same parties and the same subject matter of dispute as were before Judge Brown.[1] Unless plaintiff can establish a basis for us to act otherwise, the doctrine of res adjudicata would bar his bringing this claim again after a final disposition by Judge Brown. *Sopp* v. *Gehrlin*, 236 F.Supp. 823 (W.D. Pa. 1964) and *Burton* v. *Peartree*, 326 F. Supp. 755 (E.D. Pa. 1971); *Vassos* v. *Societa Trans-Oceania*, 272 F.2d 182 (2nd Cir. 1960), *cert. denied*, *Haldane* v. *Wilhelmina Helen King Chagnon*, 345 F.2d 601 (9th Cir. 1965). We do not subscribe to any theory that because of alleged poor or improper representation, absent fraud or wrongdoing on defendant's part, that a civil litigant should be permitted a "second bite at the apple" after an adverse ruling in a prior proceeding resulting in an unappealed final decision of a court assertedly having proper jurisdiction. Of course, if Judge Brown had no such jurisdiction of the parties, neither do we. The motion of defendant unions, either for dismissal, or for summary judgment, is granted on grounds of res judicata. Other grounds are discussed hereinafter.

[1] The complaints in both causes are substantially similar.

Order on Defendant Motions for Judgment

Plaintiff's Claim Against REA

1. Plaintiff's claims of violation of his civil rights under 42 U.S.C. 1981 through 1988 were properly dismissed and are here dismissed because barred by the applicable Tennessee one year statute of limitations. *Ellenburg* v. *Shepherd*, 406 F.2d 1331 (6th Cir. 1968) and *Mulligan* v. *Schlachter*, 389 F.2d 231 (6th Cir. 1968). In addition, plaintiff's cause of action under these sections would be subordinate to provisions of the Railway Labor Act which governs the defendant employer (and the defendant unions). See also *Oliphant* v. *Brotherhood Firemen, et al.*, 262 F.2d 359 (6th Cir. 1958) *cert. denied*, 359 U.S. 935. No effort was made by plaintiff to protect or assert his rights under the administrative procedures available under that Act. As to all claims of plaintiff other than those asserted under Title VII of the 1964 Civil Rights Act, then, the cause of action is barred under the statute of limitations defense asserted by all defendants and because plaintiff did not pursue his administrative remedy under the Railway Labor Act.

2. Judge Brown's previous order of June 14, 1971, granted defendant REA's motion for summary judgment after a hearing with respect to plaintiff's claim regarding lack of supervisory training "on the ground that from the undisputed facts plaintiff[s] have not shown any discrimination in this respect—" Judge Brown considered the affidavits and evidence before him and dismissed plaintiff's claim in this particular. We hold that Judge Brown's ruling was a final disposition and constitutes res adjudicata as to this aspect of plaintiff's claim.

3. It is also asserted that plaintiff has failed to comply with jurisdictional requirements of the Equal Employment sections of the Civil Rights Act. Judge Brown ruled that under the then circumstances of the case the "30 day provision" of the act did not bar plaintiff's claim because he relied in part upon the Court for advice as to how to file his claim of unlawful racial discrimination and simply filed his notice or letter from Equal Employment Opportunity Commission giving him the right to sue within the requisite 30 day period. This Court in *Beckum* v. *Tennessee Hotel*, Cause C-70-417, ruled similarly on the same issue on May 6, 1971. In *Beckum, supra*, however, we did not rule as to whether this procedure met minimal requirement of F.R.Civ. P. 8a(2). Further complications ensued in this case after Judge Brown's initial ruling on the 30 day statutory requirement and plaintiff's suit was dismissed without prejudice,[2] February 16, 1972. Plaintiff's counsel wrote Judge Brown again on May 5, 1972,[3] requesting reinstatement of the cause explaining the financial inability of plaintiff, and also seeking vacation of the Court's previous order. This Judge Brown declined to do since the case "has long since been dismissed".[4]

Considering all the circumstances of the matter, we find reluctantly that plaintiff has failed to meet statutory requirements and that his refiling should have taken place within 30 days after Judge Brown's February 16, 1972 order. The Chief Judge extended unusual consideration to plaintiff that would not have been granted ordinary civil

[2] It is noted, however, that notice had been issued to plaintiff that his case would be dismissed if he did not obtain a lawyer by the appointed time.

[3] See Exhibit to complaint.

[4] See Exhibit to complaint.

litigants and we cannot hold under the circumstances that Title VII Civil Rights Act requirements imposed by Congress may be indefinitely extended by the Courts. Defendant REA's motion to dismiss will therefore be granted. *See Goodman* v. *City Products Corp.*, 425 F.2d 702 (6th Cir. 1970), *Brady* v. *Bristol-Myers, Inc.*, 332 F.Supp. 995 (E.D. Mo. 1971).

It should also be observed that the Equal Employment Opportunity Commission in this case was perhaps partially at fault in the handling of plaintiff's complaint because of the long 4 year delay involved in processing the complaint before issuance of the right to sue notice. It is regrettable that plaintiff's complaint should be dismissed without a hearing on its merits by reason of the circumstances alluded to in this order.

We, nevertheless, grant all defendants' motions and dismiss the complaint filed herein for the reasons stated, but at the cost, under the circumstances, of REA.

HARRY W. WELLFORD
UNITED STATES DISTRICT JUDGE

Date: 1/24/73

A TRUE COPY.

ATTEST:

W. LLOYD JOHNSON, CLERK

/s/ By A. A. BROWN

Opinion of the United States Court of Appeals for the Sixth Circuit

No. 73-1306

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIE JOHNSON, JR.,

Plaintiff-Appellant,

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

Decided and Filed November 27, 1973.

Before WEICK, Circuit Judge, O'SULLIVAN, Senior Circuit Judge, and ALLEN,* District Judge.

WEICK, Circuit Judge. This appeal is from an order of the District Court dismissing plaintiff's complaint which alleged employment discrimination.

Plaintiff-appellant, Willie Johnson, filed timely charges with Equal Employment Opportunity Commission (EEOC) in 1967 in which he alleged that his employer, Railway

* The Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

Express Agency, Inc. (REA), discriminated against him with regard to seniority rules and job assignments. Johnson further asserted that he had been discharged by REA because of his race (black). Johnson also charged the Brotherhood of Railway Clerks Tri-State Local and the Lily of the Valley Local with maintaining segregated Locals.

On December 22, 1967 EEOC filed a report concluding that the company and the unions had engaged in discriminatory practices; however, it was not until January 15, 1971 that Johnson received his notice of right to sue letter from EEOC. Initially Johnson was unable to retain a lawyer to file suit authorized by the letter. On February 12, 1971 District Judge Bailey Brown allowed Johnson to file the EEOC notice-letter with the Clerk as satisfying the duty to institute suit within thirty days from date of receiving notice. Judge Brown further allowed Johnson to proceed *in forma pauperis* and appointed an attorney to represent him. The court-appointed attorney filed an amended complaint on March 18, 1971, setting forth in more detail Johnson's claims.

At this point both defendants moved for summary judgment supported by affidavits. The unions also propounded to plaintiff interrogatories, which he answered. Plaintiff submitted no affidavits in opposition to these motions.

On June 14, 1971 the Court entered an order which—

(1) dismissed all claims based on statutes other than Title VII of the 1964 Civil Rights Act as barred by Tennessee's one-year statute of limitations,

(2) denied the defendants' claims that the filing of the EEOC notice-letter was insufficient to meet the thirty-day filing requirement,

(3) granted the two unions' motions for summary judgment, holding that the plaintiff had no claim against them under the 1964 Civil Rights Act,

(4) granted the motion of REA for summary judgment regarding improper supervisory training, and

(5) denied REA's motion for summary judgment regarding Johnson's claims of discriminatory discharge, denial of promotional opportunities, and discrimination in job assignment.

After this ruling, REA offered Johnson one hundred fifty dollars in settlement of the case; Johnson refused. Subsequently the case was assigned for trial and Johnson's court-appointed attorney, with the Court's permission, withdrew from the case on January 14, 1972. On that date the Clerk of the District Court, acting pursuant to the Court's direction, wrote a letter to Johnson giving him thirty days in which to obtain a new attorney or have his case dismissed without prejudice. Johnson did not obtain a new attorney within such time, and on February 16, 1972 Judge Brown entered an order dismissing the action without prejudice. We need not determine the propriety of this order because it was a final order from which no appeal was taken.

On February 17, 1972 William Caldwell, now one of Johnson's lawyers, wrote to Judge Brown informing him that he, Caldwell, was looking for financial support which would enable him to take Johnson's case. The letter was clearly not an announcement that Caldwell was his counsel: the letter stated only that he might be Johnson's counsel at some point in the future. Later Caldwell found such financial support and did undertake to represent Johnson. On May 31, 1972 a second complaint was filed against REA

and the unions, with Caldwell acting as counsel for Johnson.

All of the defendants moved for dismissal or, in the alternative, for summary judgment. The case was assigned to District Judge Wellford, who ruled on these motions on January 25, 1973. First, the Court dismissed Johnson's claims against the unions on grounds of *res judicata,* holding that the present suit involved the same parties and the same subject matter decided in the first action where summary judgment was granted by Judge Brown. Second, the Court held that Johnson's claims of violation of his civil rights under 42 U.S.C. §§ 1981 through 1988, were barred by Tennessee's one-year statute of limitations. Third, the Court found that Johnson did not pursue properly his administrative remedies under the Railway Labor Act. Fourth, the Court held that *res judicata* barred Johnson's claims against REA on the issue of supervisory training. Fifth, the Court ruled that Johnson's failure to refile a lawsuit within thirty days from February 16, 1972 (the date of dismissal without prejudice) resulted in a failure to comply with the thirty-day filing requirement.

We will deal first with the thirty-day filing requirement since failure to meet it results in a lack of jurisdiction. *Goodman* v. *City Prods. Corp.*, 425 F.2d 702 (6th Cir. 1970).

Johnson contends that he was not required to file suit within thirty days after dismissal without prejudice. He argues that the only statutory requirement is that he file his original suit within thirty days after receipt of his notice-letter. We disagree. We rely on our decision in *Bomer* v. *Ribicoff*, 304 F.2d 427 (6th Cir. 1962), and the decision in *McClendon* v. *North American Rockwell Corp.*,

2 CCH Employment Prac. Dec., Par. 10,243 (C.D. Cal. 1970).

In *Bomer*, plaintiff's request for increased benefits under the Social Security Act was denied on August 4, 1959. He was advised that he could file a civil action within sixty days, challenging this determination, since there was a statutory procedure for such challenge within that time span. He filed such suit on September 30, 1959. On May 5, 1960, on his motion his case was dismissed without prejudice. Plaintiff later refiled his action on May 1, 1961. The Government moved to dismiss, contending that the plaintiff failed to commence suit within sixty days after notice of the final decision on August 4, 1959. The District Judge granted the Government's motion and dismissed the case. In affirming, Judge Shackelford Miller wrote for a unanimous court:

> An action dismissed without prejudice leaves the situation the same as if the suit had never been brought. A. B. Dick Co. v. Marr, 197 F.2d 498, 502, C.A. 2nd; cert. denied, 344 U.S. 878, 73 S.Ct. 169, 97 L.Ed. 680, rehearing denied, 344 U.S. 905, 73 S.Ct. 282, 97 L.Ed. 699; Bryan v. Smith, 174 F.2d 212, 214, C.A. 7th. In the absence of a statute to the contrary a party cannot deduct from the period of the statute of limitations the time during which the action so dismissed was pending. Humphreys v. United States, 272 F.2d 411, 412, C.A. 9th; Willard v. Wood, 164 U.S. 502, 523, 17 S.Ct. 176, 41 L.Ed. 531; DiSabatino v. Mertz, 82 F.Supp. 248, 249-250, M.D.Pa.
>
> The right of action here sought to be enforced is one created by statute and is limited by the provisions thereof as to the time within which the right must be

> asserted. Such conditions operate as a condition of liability rather than as a period of limitation and there can be no recovery unless the condition precedent is fulfilled. Zeller v. Folsom, 150 F.Supp. 615, 617, N.D.N.Y.; Coy v. Folsom, 228 F.2d 276, 279-280, C.A. 3rd; Ewing v. Risher, 176 F.2d 641, C.A. 10th; Scott v. Railroad Retirement Board, 227 F.2d 684, 686, C.A. 7th. (304 F.2d at 428, 429)

Additionally, in *Kington* v. *United States,* 396 F.2d 9 (6th Cir. 1968), we held that filing of previous actions in state and federal courts, which were voluntarily dismissed, did not toll the two-year statute of limitations of the Federal Tort Claims Act. 28 U.S.C. § 2401 (b).

McClendon, supra, is the case factually closest to the one at bar. There, plaintiff received a right to sue letter on January 15, 1968, and filed an action on January 19, 1968 which was dismissed without prejudice on September 9, 1969. On October 29, 1969, fifty days later, the plaintiff filed another complaint, identical to the first. Defendant moved for dismissal on the ground that the court lacked subject matter jurisdiction since the complaint was not filed within thirty days following receipt of the right to sue letter.

In *McClendon* the District Court noted that the effect of voluntary dismissals without prejudice, absent a savings statute, was to create a situation the same as though the suit had never been brought. The Court stated:

> Even assuming that the jurisdictional time period should begin to run anew as of the date of voluntary dismissal was entered, such a position would be of no

> benefit to plaintiff in this case. Dismissal was ordered on September 9, 1969. Suit, however, was brought on October 29, some fifty days later. Thus even if the Section 706(e) time period of thirty days was tolled by the first suit, plaintiff's new suit would still be jurisdictionally defective. 2 CCH E. P. Dec. at 974.

Although *Bomer* and *McClendon* are authority for the proposition that the filing of a suit which was dismissed without prejudice did not toll the thirty-day filing requirement of Title VII, the District Court was of the view that the complaint should have been refiled within thirty days after such dismissal. But, even extending the time an additional thirty days, the new suit was still jurisdictionally defective because it was not filed within that time.

We are of the opinion that the District Court was clearly correct in holding that at a minimum Johnson had to file the new case within thirty days from the date of dismissal without prejudice.

Any other holding would result in plaintiff's having no time limitation to refile in this type of an action after the action had been dismissed without prejudice. Such latitude for a plaintiff would create uncertainty, delay in processing his claim, and the possibility of stale claims being pursued. Here, the claim was already stale before the initial suit was filed. 42 U.S.C. § 2000e-5(e) was meant to eliminate such possibilities.

Any error that was committed was an error in favor of appellant Johnson. He failed to comply even with the District Court's liberal interpretation of the requirement by his failure to file within thirty days after dismissal. The

Title VII claims are thus barred since the Court was without jurisdiction to hear the charges set forth in the new complaint filed on May 31, 1972.

The second question for consideration is whether Johnson's claims under 42 U.S.C. §§ 1981, 1982 and 1983, were time-barred by a Tennessee statute of limitations. Both Judge Brown's first ruling and Judge Wellford's later order found that these claims were time-barred. We agree. It is the duty of Federal Courts to apply the state statute of limitations most analogous to these actions. Appellant agrees with this but differs only as to what is the most analogous statute.

We feel that the most analogous statute is Title 28, Section 304, of the Tennessee Code. It reads as follows:

> *Personal tort actions — Malpractice of attorneys — Civil rights actions — Statutory penalties.* — Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and statutory penalties shall be commenced within one (1) year after cause of action accrued.

Appellant contends that while this state statute, Section 304, is appropriate for Sections 1983 and 1985 actions, it is not appropriate for § 1981 actions. However, *Snyder* v. *Swann*, 313 F.Supp. 1267 (E.D. Tenn. 1970), held this precise statute applicable to a Section 1981 action.

Appellant further contends that his complaint sounds in contract and is governed by a six-year statute of limitations. In our opinion, the complaint sounds in tort rather than in contract. Moreover, the very language of the state statute refers to "civil actions . . . brought under the federal civil rights statutes." Thus, the tort-contract dichotomy does not have to be resorted to, given the preciseness of the state statute.

Finally on this point appellant argues that filing of the charges with the EEOC tolls the statute of limitations under 42 U.S.C. § 1981. We reject this claim. In *Williams* v. *Hollins,* 428 F.2d 1221 (6th Cir. 1970), we declined to toll the statute in a section 1983 action during the time when plaintiff was in a Tennessee jail, since Section 301 of Title 28 of the Tennessee Code did not contain any such savings clause. In addition, appellant concedes the Title VII and Section 1981 claims are independent. Thus, no reason exists for stopping the running of a state statute of limitations while a charge is pending before the EEOC.

We have considered other points assigned as error, but in view of our disposition of the case they do not require discussion.

The judgment of the District Court is affirmed.

Order on Petition for Rehearing

No. 73-1306

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Filed January 15, 1974, James A. Higgins, Clerk

WILLIE JOHNSON, JR.,

Plaintiff-Appellant,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

---

Before:

WEICK, *Circuit Judge,*
O'SULLIVAN, *Senior Circuit Judge,* and
ALLEN,* *District Judge.*

This cause came on to be heard on the petition for rehearing, with a suggestion that it be heard en banc; and no Judge having requested that a vote be taken on whether said petition should be heard en banc, the petition for rehearing was referred to and was considered and determined by the panel.

The basis of the first part of our opinion was that when a Title VII (1964 Civil Rights Act) action was dismissed without prejudice, the plaintiff against whom the order was

---

* The Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

entered had thirty days to refile the complaint.[1] Failure to meet this requirement was held to result in a jurisdictional defect.

Appellant's basic argument in his brief supporting the petition for rehearing is that the Tennessee Savings Statute, T.C.A. 28-106, grants an entire year after such dismissal without prejudice to refile in the State Court. Appellant argues that this state statute is applicable because the federal statute involved gives no guidance as to time limitations.

It is clear that in civil rights actions brought under 42 U.S.C. §§ 1981 through 1988, a state statute of limitations is looked to because the federal statute is silent. *Madison* v. *Wood*, 410 F.2d 564 (6th Cir. 1969). However, Title VII of the 1964 Civil Rights Act is far from silent in regard to a limitations period for actions brought pursuant to the Act. It grants to claimants thirty days from the date of receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) within which to file suit in the Federal District Court.

The state statute of limitations and its savings clause are never reached in this case because the federal statute is not silent. While the language of the federal statute may not cover the situation precisely, it indicates a clear policy that should be looked to before a state statute is embraced.

[1] The District Court held that many of the issues raised by the plaintiff in his second suit were decided against him in the first action in which the Court granted summary judgment against the plaintiff, and reconsideration was barred by the doctrine of res judicata. Johnson did not appeal from these summary judgments. We agree with the District Court that the unions have a complete defense on the ground of res judicata, and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned.

The federal statute provides that claimants have thirty days from receipt of a right-to-sue letter, to file law suits. If they have only thirty days to file initially, it is difficult to see why claimants should have more than thirty days to refile after dismissal without prejudice, particularly when such refiling is ordered by the Court.

The requirement of refiling within thirty days seems ample time. A complaint is easily drawn and filed; indeed, in this case all that need be done is to refile the original complaint. In these cases of alleged employment discrimination, there is no latent injury waiting to be discovered which would justify an extended period of time in which to refile. The complainant already knew what his grievance was, as it had been pending before EEOC for more than three years before he was authorized to file suit in the District Court. There is no reason not to expect expeditious processing of such claims in accord with a thirty-day requirement.

The second basis for our decision was that appellant's civil rights claims under 42 U.S.C. § 1981 were barred by the Tennessee one-year statute of limitations, T.C.A. 28-304. Appellant's employment was terminated in June, 1967, and the complaint was not filed until March 18, 1971. T.C.A. 28-304 applies to "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes. . . ." Appellant appears not to attack the controlling nature of this statute but rather its constitutionality. Appellant argues that the statute is arbitrary since it places the same limitations period on all federal civil rights statutes.

We see nothing about the statute that violates equal protection or due process rights of any individual. T.C.A. 28-304 is not directed solely at civil rights claims, and even

if it were, it would not necessarily be arbitrary in a constitutional sense. The statute applies also to a wide variety of personal tort actions and to claims of malpractice against attorneys.

Appellant relies on *Hunter* v. *Erickson*, 393 U.S. 385 (1969) and suggests that this statute of limitations creates an explicit racial classification. This contention is obviously unfounded because citizens of all races are entitled to take advantage of the federal civil rights statutes.

Finally, appellant argues that the filing of his Title VII claim with the EEOC tolls the state statute regarding his claims under 42 U.S.C. § 1981. In a letter supplementing his brief supporting his petition for reconsideration, appellant cites *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95 (D.C.Cir. 1973), in which the Court stated in a footnote (n.30) that the filing of charges with the EEOC tolled the statute of limitations on a Section 1981 action. We decline to adopt this position.

It appears to us that the footnote in *Macklin* v. *Spector*, *supra*, is inconsistent with the rationale in the text of the opinion. *Spector* had argued that since no complaint had been lodged with the EEOC, plaintiff's Section 1981 action had to be dismissed. The Court held, and we think correctly, that no exhaustion of EEOC procedures was necessary to bring a Section 1981 claim, because § 1981 constitutes a cause of action separate and independent from a Title VII claim. The Court said:

> ". . . Section 1981 and Title VII, in truth, provide for such radically different schemes of enforcement and differ so widely in their substantive scopes that using the policies behind the latter to create procedural barriers to actions under the former would stretch to the

breaking point courts' customary duty to accommodate allegedly conflicting legislation." 478 F.2d at 996.

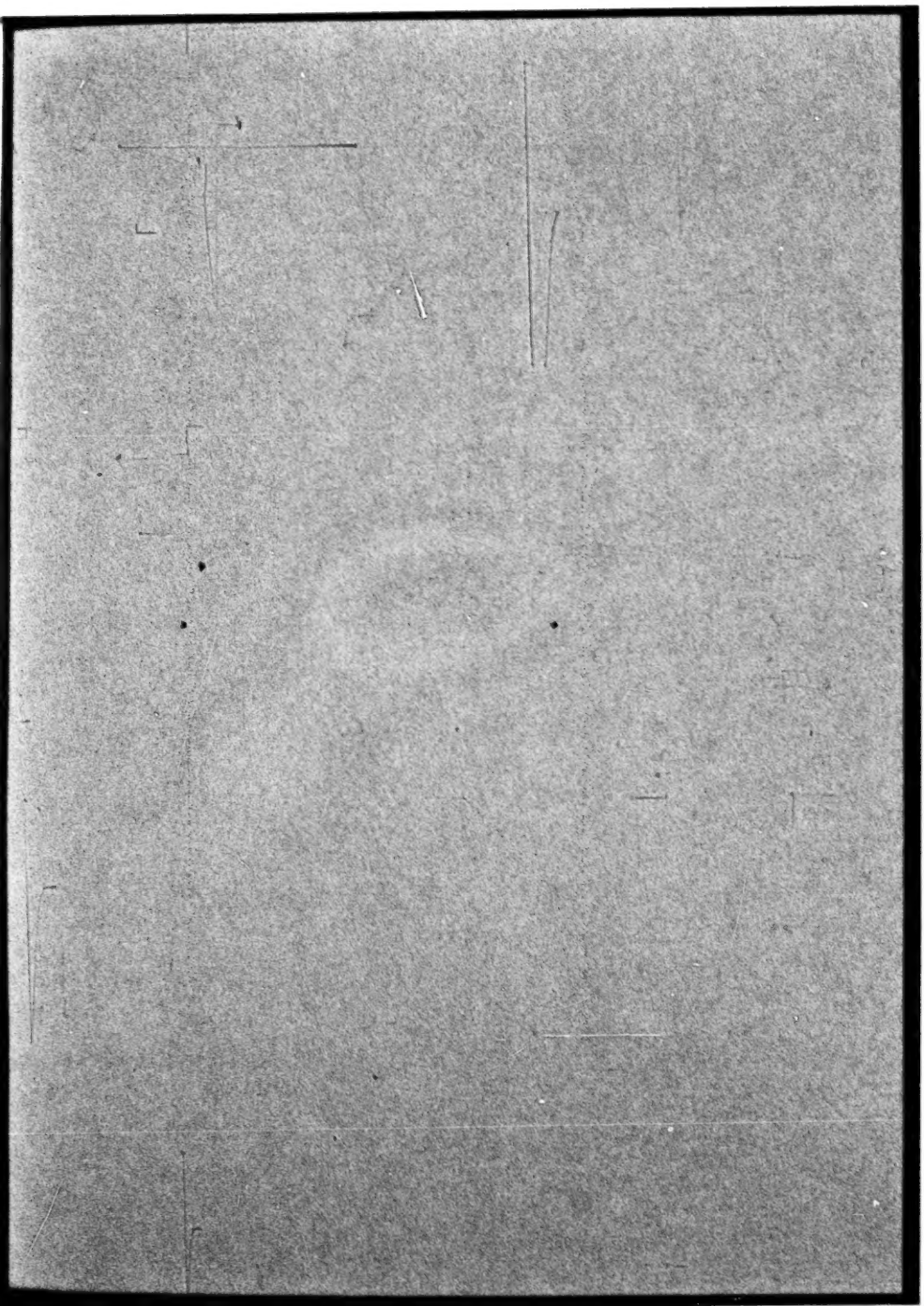
If the two actions "differ so widely in their substantive scopes" the filing of one should not toll the statute of limitations on the other. The Court suggested in the relevant footnote that the basic reason for such tolling was a Congressional desire to favor informal means of accommodation provided for under Title VII. We think that there is enough flexibility in the federal trial system so that conciliation processes will not be destroyed if a Section 1981 case is heard while a Title VII claim is being processed. *Jenkins* v. *General Motors Corp.*, 354 F.Supp. 1040 (D.Del. 1973).

In *Jenkins* the Court also held that no tolling effect on § 1981 claims took place with the filing of Title VII charges with the EEOC. The Court relied heavily on the reasoning in *Young* v. *International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971). *Young* held that Title VII claims and § 1981 claims were separate and independent, and that Title VII imposed no jurisdictional barriers to a § 1981 action. We agree with this reasoning and with that included in the text of the opinion in *Macklin* v. *Spector, supra.*

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT.

/s/ JAMES A. HIGGINS
Clerk



PETITION FOR A WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
10 Columbus Circle
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMON & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	5
Reasons for Granting the Writ	11
I—The Decision Below With Respect to the Tolling Effect of the Filing of an EEOC Charge Conflicts With Other Court of Appeals Decisions on an Issue Having Serious Implications For the Effectiveness of Title VII and Judicial Administration of Important Federal Statutes	13
II—The Failure of the District Court to Protect the Procedural Rights of Petitioner and the Sanctioning of That Failure by the Court of Appeals Make This a Compelling Case for the Exercise of This Court's Supervisory Authority	15
a. Petitioner's Section 1981 Claim Should Not Be Barred by Tenn. Code § 28-304	15
b. A Claim Under 42 U.S.C. § 1981 Does Not Require Prior Exhaustion of Administrative Remedies Under the Railway Labor Act	18
c. Petitioner's Title VII Action Should Not Have Been Precluded by His Failure to Refile His Complaint Within 30 Days After Dismissal	19

PAGE

d. Petitioner's Claims Against the Union Locals and Claim Against REA on the Issue of Supervisory Training Are Not Barred by the Doctrine of *Res Judicata* 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Alexander v. Gardner-Denver Co., —— U.S. ——, 39 L.Ed.2d 147 (1974) 11, 15, 18
American Pipe and Construction Co. v. Utah, —— U.S. ——, 38 L.Ed.2d 713 (1974) 15, 20
Austin v. Reynolds Metal Co., 327 F. Supp. 1145 (E.D. Va. 1971) 21

Balsbaugh v. City of Westland, 458 F.2d 1358 (6th Cir. 1972) 24
Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971) 11, 13, 16
Brady v. Bristol-Myers, Inc., 459 F.2d 621 (8th Cir. 1972) 19
Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972) 19
Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd. per curiam*, 476 F.2d 1287 (5th Cir. 1973) 16
Burnett v. New York Central R. Co., 380 U.S. 424 (1965) 14, 20

Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972) 19
Culpepper v. Reynolds Metals, 421 F.2d 888 (5th Cir. 1970) 14

PAGE

Denman v. Shubow, 413 F.2d 258 (1st Cir. 1969) 22, 23

Gates v. Georgia Pacific Corp., 7 CCH EPD ¶ 9185 (9th Cir. 1974) 19, 20
Glover v. St. Louis & San Francisco R. Co., 393 U.S. 324 (1969) 18
Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S.D. Tex. 1972) 13, 14

Hamman v. United States, 399 F.2d 673 (9th Cir. 1968) 24
Harris v. Walgreen's Distribution Center, 456 F.2d 588 (6th Cir. 1972) 20, 21
Henderson v. First National Bank of Montgomery, 344 F. Supp. 1373 (M.D. Ala. 1972) 13, 15
Holmberg v. Armbrecht, 327 U.S. 392 (1945) 20
Hunter v. Erickson, 393 U.S. 385 (1969) 17
Hutton v. Fisher, 359 F.2d 913 (3rd Cir. 1966) 22

Jenkins v. General Motors Corp., 354 F. Supp. 1040 (D. Del. 1973) 13
Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969) 16

Klaprott v. United States, 335 U.S. 601 (1949) 22

Love v. Pullman, 404 U.S. 522 (1972) 19

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 11, 13, 14, 17, 19
Malone v. North American Rockwell Corp., 457 F.2d 779 (9th Cir. 1972) 14
McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) 18
McClendon v. North American Rockwell Corp., 2 CCH EPD ¶ 10,243 (C.D. Cal. 1970) 21

PAGE

McDonnell v. Celebrezze, 310 F.2d 43 (5th Cir. 1962) 22
McKnett v. St. Louis & S.F. R. Co., 292 U.S. 230 (1932) 17
McQueen v. E.M.C. Plastics Co., 302 F. Supp. 881 (E.D. Tex. 1969) 20, 21

Newman v. Piggie Park, 390 U.S. 400 (1968) 19

Patapoff v. Vollstedt's, Inc., 267 F.2d 863 (9th Cir. 1959) 22
Prescod v. Ludwig Industries, 325 F. Supp. 414 (N.D. Ill. 1971) 21
Public Service Commission v. Brashear Freight Lines, 312 U.S. 621 (1941) 24

Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538 (2nd Cir. 1963) 22
Republic Pictures v. Kappler, 327 U.S. 757 (1946), *aff'g* 151 F.2d 543 (8th Cir. 1945) 17
Reynolds v. Daily Press Inc., 5 CCH EPD ¶ 7991 (E.D. Va. 1972) 13
Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. denied* 404 U.S. 1006 (1971) 16
Rooks v. American Brass Co., 263 F.2d 166 (6th Cir. 1959) 22

Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971) 19
Schiff v. Mead Corp., 3 CCH EPD ¶ 8043 (6th Cir. 1970) 14
Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944) 18
Sullivan v. Delaware River Port Authority, 407 F.2d 158 (3rd Cir. 1969) 24

PAGE

Town of Marshall v. Carey, 42 F. Supp. 630 (W.D. Okla. 1941) 24

United States v. Jacobs, 298 F.2d 469 (4th Cir. 1961) 22
U.S. v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973) 16
United States v. Wallace & Tiernan Co., 336 U.S. 793 (1949) 24

Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970) 17, 19
Wells v. Gainesville-Hall County Economic Opportunity Organization, Inc., 5 CCH EPD ¶ 8541 (N.D. Ga. 1973) 14

Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971) 19

Statutes:

Civil Rights Act of 1866,
42 U.S.C. § 1981 ..... *passim*

Title VII, Civil Rights Act of 1964,
42 U.S.C. §§ 2000e *et seq.* ..... *passim*

Railway Labor Act,
45 U.S.C. §§ 151 *et seq.* 3, 10, 18, 19

Tennessee Code
§ 28-106 21
§ 28-304 ..... 5, 10, 12, 15, 16, 17
§ 28-309 16
§ 28-310 ..... 16, 17

PAGE

Federal Rules of Civil Procedure
Rule 54(b) 24
Rule 60(b) 3, 10, 22

Other Authorities:

1B Moore's Federal Practice ¶ 0.401 (2d Ed. 1965) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on November 27, 1973.

Opinions Below

1. District Court's order in No. C-71-66 dismissing claims under 42 U.S.C. §1981 and granting summary judgment to union locals and partial summary judgment to REA Express on Title VII claims, June 14, 1971, reported at 7 CCH EPD ¶9108 (1a-3a).[1]

[1] This form of citation is to pages of the Appendix.

2. District Court's order in No. C-71-66 dismissing action without prejudice, February 16, 1972, reported at 7 CCH EPD ¶9109 (4a-5a).

3. District Court's opinion and order in No. C-72-183 dismissing refiled complaint, January 25, 1973, reported at 7 CCH EPD ¶9110 (6a-12a).

4. Opinion of Court of Appeals, November 27, 1973, reported at 489 F.2d 525 (13a-21a).

5. Order Denying Rehearing, January 15, 1974, reported at 489 F.2d 525, 530 (22a-26a).

Jurisdiction

The Court of Appeals entered judgment on November 27, 1973. A timely request for rehearing was denied January 15, 1974, and this petition for certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5, tolls the running of the period of limitation applicable to an action based on the same facts brought under the Civil Rights Act of 1866, 42 U.S.C. §1981?

2. Whether a person who claims that he has been discriminated against in employment on account of his race

should be denied a hearing on the merits on any of the following grounds:

a) As to his cause of action under 42 U.S.C. §1981—

i) That Tennessee's one-year statute of limitations on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes" bars an employment discrimination suit seeking injunctive relief and back pay;

ii) That failure to exhaust administrative remedies under the Railway Labor Act bars a suit;

b) As to his cause of action under Title VII, a suit dismissed without prejudice for failure to obtain counsel must be refiled within 30 days of the order of dismissal and the order may not be reopened under Rule 60(b), F.R. Civ. P.; and

c) As to his causes of action under either statute, an interlocutory order granting unopposed motions for summary judgment in an action subsequently dismissed without prejudice for failure to obtain counsel has *res judicata* effect.

Statutory Provisions Involved

1. United States Code, Title 42, Section 1981 (The Civil Rights Act of 1866) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall

be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. United States Code, Title 42, Section 2000e-5(e) (Section 706(e) of Title VII of the Civil Rights Act of 1964, 78 Stat. 259) (prior to its amendment by Pub.L. 92-261) reads as follows:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

3. Tennessee Code, Section 28-304, 5 Tennessee Code Annotated 255, provides, in pertinent part:

> *Personal tort actions—Malpractice of Attorneys—Civil rights actions—Statutory penalties,*—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under federal civil rights statutes, and actions for statutory penalties shall be commenced within one (1) year after the cause of action accrued. . . .

Statement of the Case

Petitioner, Willie Johnson, Jr., is a black man who claims to have been subjected by respondents to racial discrimination in the terms and conditions of employment. Petitioner's claims have never received a determination of their merits by a federal court. The procedural vicissitudes of this litigation, therefore, form the basis of this petition.

Petitioner was employed by respondent Railway Express Agency Inc. ("REA") in the spring of 1964 as an express handler in Memphis, Tennessee. Approximately thirty days after his hire date, and pursuant to respondent REA's direction or referral, petitioner became a member of respondent Brotherhood of Railway Clerks Lily of the Valley Local. More than one year after his initial employment petitioner became a truck driver with REA.

On May 31, 1967, petitioner filed a timely charge with the Equal Employment Opportunity Commission ("EEOC") charging respondent REA with discriminating against its

black employees with respect to seniority rules and job assignments. He also charged respondent union locals with maintaining racially segregated locals, Brotherhood of Railway Clerks Tri-State Local for whites and Lily of the Valley Local for blacks. On June 20, 1967 respondent REA terminated petitioner's employment, and on September 6, 1967 petitioner amended his EEOC charge to allege that he had been discharged because of his race.

The EEOC issued a report on December 22, 1967 concluding that respondents had engaged in unlawful racially discriminatory employment practices, in that REA directed black employees to membership in Lily of the Valley Local and white employees to membership in Tri-State Local, that membership dues were higher in the black local than in the white local, that REA maintained racially segregated job classifications, that respondent REA's seniority system and job assignments were discriminatory, that REA discriminated against blacks in the imposition of disciplinary action, and that petitioner was discriminatorily discharged. On March 31, 1970 the EEOC issued a decision finding reasonable cause to believe that respondent had violated Title VII of the Civil Rights Act of 1964, and on January 10, 1971 petitioner received from the EEOC a notice of his right to bring suit within 30 days.

Petitioner was unable to obtain private counsel and District Judge Bailey Brown entered an order February 12, 1971 appointing an attorney to represent petitioner and allowing petitioner's notice of right to sue to be filed as a complaint on a pauper's oath.

The court-appointed attorney filed a "Supplemental Complaint" alleging violation of Title VII and 42 U.S.C. §§1981 et seq., and invoking the Court's jurisdiction under 28 U.S.C. §1343(4) and 42 U.S.C. §2000e-5f. The complaint

filed March 18, 1971 alleged that respondent REA, in conjunction with respondent union locals, engaged in a policy and practice of discriminating against black employees with respect to promotional opportunities and that respondent's job assignment and promotion practices served "to maintain a preexisting pattern of racial discrimination in employment." Petitioner further alleged that he had been denied supervisory training and promotion opportunities which were accorded to white employees, that respondent union locals did not afford black members (including petitioner) the same quality of representation afforded to white members, and that petitioner's discharge was the result of respondent REA's racially discriminatory employment practices. Petitioner prayed for preliminary and permanent injunctive relief, back pay, costs and attorney's fees.

Respondents REA and union locals filed their answers on March 29 and April 6, 1971, respectively. The case was then scheduled for trial on August 18, 1971.

On April 30 and May 11, 1971, the unions and REA, respectively, filed motions to dismiss or in the alternative for summary judgment.

Petitioner's court-appointed attorney filed no memoranda or affidavits on behalf of petitioner in opposition to these motions.

Judge Brown entered an order June 30, 1971 which, *inter alia*, 1) dismissed all claims based on 42 U.S.C. §1981 as barred by Tennessee's one-year statute of limitations for actions "for compensatory or punitive damages, or both, brought under the federal civil rights statutes"; 2) granted summary judgment to the defendant unions; and 3) granted REA partial summary judgment on the issue of improper supervisory training (1a-3a).

Thereafter, the case having been rescheduled for trial on February 2, 1972, respondent REA served petitioner with interrogatories, filed a pre-trial memorandum as required by local rules of court, and took petitioner's deposition. Petitioner's court-appointed counsel took no discovery, by interrogatories, deposition, or otherwise, and filed no pre-trial memorandum.

REA offered Johnson a settlement of one hundred and fifty dollars which Johnson refused. Petitioner's counsel then filed, on January 5, 1972, a motion to be relieved as attorney of record on the grounds that petitioner's case was "questionable," petitioner had not substantiated money damages and had not expressed an intention of advancing the funds necessary for taking depositions, and because petitioner had refused REA's settlement offer. The clerk of the district court advised petitioner by letter dated January 14, 1972 that the motion to withdraw had been granted, and informed plaintiff that if he did "not obtain another counsel to represent [him] within 30 days from this date, [his] claim will be dismissed without prejudice."[2]

Upon receipt of the clerk's letter, petitioner, in an effort to obtain representation, contacted the Memphis EEOC field attorney, the Memphis & Shelby County Legal Services Association, the Shelby County Bar Association Legal Referral Service, and two private attorneys. Finally at the end of the 30 days he returned to the firm of Ratner, Sugarmon & Lucas[3] and explained his plight to William E. Cald-

[2] Petitioner received no notice of a hearing on the motion to withdraw and was afforded no opportunity to state his position. The court made no finding that petitioner was either unable or unwilling to proceed *pro se* or that petitioner was responsible for any delay in bringing the case to trial. No order granting the motion to withdraw was ever entered.

[3] Petitioner had first contacted this firm after receipt of his notice of right to sue. The firm was unable to undertake the repre-

well of the firm. On February 17, 1972 Caldwell wrote a letter to Judge Brown indicating that he was attempting to obtain financial support for the litigation and requesting an additional thirty days for petitioner to obtain counsel. However, the preceding day, February 16, Judge Brown had entered an order dismissing petitioner's case "without prejudice" (4a-5a).

On May 5, 1972, Caldwell again wrote to Judge Brown indicating that the NAACP Legal Defense and Educational Fund had agreed to pay litigation costs for petitioner, entering an appearance for petitioner, and requesting that the order of February 16 be vacated and that the case be reinstated on the active docket of the court. Judge Brown replied on May 8, 1972 indicating that the "proper way to handle this matter would be to file a new action since the old one has long been dismissed."

Pursuant to Judge Brown's letter, Caldwell, on May 31, 1972, filed a new complaint on petitioner's behalf (Civil Action No. G-72-183), assigned to District Judge Harry W. Wellford. The new complaint reiterated petitioner's original allegations. Respondent REA and union locals moved for dismissal or for summary judgment on the grounds of untimeliness and *res judicata*. The district court, per Judge Wellford, entered an order of dismissal on the grounds that 1) Judge Brown's interlocutory order of June 14, 1971 granting summary judgment to respondent union locals and partial summary judgment to respondent REA was a "final disposition" constituting *res judicata*, 2) that petitioner's claims under 42 U.S.C. §§1981 et seq. were barred by Tennessee's one-year statute of limitations on "actions for compensatory or punitive damages,

---

sentation of petitioner because of his inability to defray litigation expenses and because of the great number of pending Title VII cases to which the District Court has appointed the firm.

or both, brought under the federal civil rights statutes"[4] and because plaintiff did not pursue his administrative remedies under the Railway Labor Act, and 3) that petitioner had "failed to meet the statutory requirements" of Title VII because he failed to refile his suit within 30 days after Judge Brown's February 16, 1972 order of dismissal without prejudice (6a-12a).

The Court of Appeals affirmed the order of dismissal, disposing of the case on timeliness grounds (13a-21a). First, the Court of Appeals held that the Title VII claims were jurisdictionally barred because "at a minimum [petitioner] had to file the new case within thirty days from the date of dismissal without prejudice."[5] Second, the court held that petitioner's claims under 42 U.S.C. §1981 were time-barred by the running of the statute of limitations. In reaching this conclusion as to the Section 1981 claims the Court of Appeals held: a) that the applicable statute was the one-year limitation contained in Tenn. Code §28-304; and b) that the running of the statute on the Section 1981 claims was not tolled by petitioner's timely filing of charges with the EEOC.[6] The Court of Appeals did not discuss the issues of *res judicata* and exhaustion of remedies under the Railway Labor Act or the failure of the District Court to grant petitioner relief from the dismissal without prejudice pursuant to Rule 60(b).

In its opinion denying rehearing, the Court of Appeals reaffirmed its initial opinion, stating that Tennessee's attempted application of a one-year limitation period to all

---

[4] Tenn. Code §28-304.

[5] With regard to Judge Brown's February 16, 1972 order of dismissal without prejudice, the Court of Appeals stated:

"We need not determine the propriety of this order because it was a final order from which no appeal was taken" (15a).

[6] If the statute had been so tolled, petitioner's second complaint, even if regarded as a new action, would have been timely filed.

civil rights actions, regardless of their nature, is not "arbitrary in a constitutional sense" and the statute does not create "an explicit racial classification . . . because citizens of all races are entitled to take advantage of the federal civil rights statutes" (22a-26a).[7]

Reasons for Granting the Writ

1. Assuming for purposes of argument that it was proper to apply to petitioner's claim under 42 U.S.C. §1981 the one-year limitation period provided in Tenn. Code §28-304, even petitioner's second complaint (with respect to his Section 1981 claim) would have been timely had the court below held that the running of the period had been tolled by his filing of a charge with the EEOC.[8] Its holding to the contrary squarely conflicts with decisions of the District of Columbia Circuit and Fifth Circuit Courts of Appeals[9]—indeed, the court below expressly acknowledged its disagreement with the Court of Appeals for the District of Columbia (25a). Moreover, the decision below is incompatible with the flexible approach to overlapping remedies in employment discrimination cases—viz., that pursuit of one does not preclude another—taken by this Court in *Alexander* v. *Gardner-Denver Co.*, —— U.S. ——, 39

[7] In a footnote, the court stated that it agreed with the district court on the *res judicata* question.

[8] Petitioner filed his charge with the EEOC on May 31, 1967, while still employed by REA. The discriminatory acts alleged therein were continuing in nature, so that none of the one-year period had run prior to said filing. The first complaint was filed 25 days after termination of EEOC proceedings, that is, after petitioner received his notice of right to sue; and the second complaint was filed 105 days after the first complaint was dismissed without prejudice. Hence only 130 days of the one-year period had run when the second complaint was filed.

[9] *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95 n.30 (D.C. Cir. 1973); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n.15 (5th Cir. 1971).

L.Ed.2d 147 (1974) (pursuit of remedy under arbitration clause no bar to Title VII action). The holding of the court below would, if allowed to stand, interfere substantially with the successful administration of Title VII. Persons aggrieved by discriminatory employment practices would be discouraged from invoking the assistance of the EEOC and possibly achieving voluntary compliance, inasmuch as they could preserve their claims under Section 1981 only by filing suit, regardless of whether the EEOC had completed its investigation and its attempts at conciliation.

2. The ruling of the court below affirming the dismissal of (a) petitioner's Section 1981 claims on the further grounds of failure to exhaust administrative remedies under the Railway Labor Act and of untimeliness under a state statute, Tenn. Code § 28-304, imposing a one-year limitation period on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes," (b) petitioner's Title VII claims on the grounds of his failure, when unrepresented by counsel, to refile within thirty days after dismissal without prejudice (petitioner having been given no notice of this requirement),[10] and (c) petitioner's claims, under both statutes, against the unions and, as to failure to train, against REA, on the ground of *res judicata*, so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. This court should not allow the great national values expressed in the Civil Rights Acts of 1866 and 1964 to be frustrated by technical rules which, woodenly applied,

[10] In its order denying rehearing, the Court of Appeals makes an observation which suggests that petitioner was directed to refile his complaint within thirty days: "[I]t is difficult to see why claimant should have more than thirty days to refile after dismissal without prejudice, particularly when said refiling is ordered by the Court" (24a). This suggestion that "said refiling [was] ordered by the Court" is wholly without support in the record.

deprive a plaintiff—inadequately represented by court-appointed counsel or wholly unrepresented because of the precipitate withdrawal of said counsel—of the opportunity to have his claims of racial discrimination at the hands of large corporations and powerful unions decided on the merits.

I

The Decision Below With Respect to the Tolling Effect of the Filing of an EEOC Charge Conflicts With Other Court of Appeals Decisions on an Issue Having Serious Implications For the Effectiveness of Title VII and Judicial Administration of Important Federal Statutes.

The Court of Appeals' rejection of the rule that the period of limitation applicable to a Section 1981 action should be tolled for the period during which resolution through the conciliation procedures of the EEOC is attempted (20a-21a, 25a-26a), is in conflict with the decisions of the only other courts of appeals, those for the District of Columbia and the Fifth Circuit, which have considered the question, and with the great majority of district court decisions.[11] The Sixth Circuit's holding also conflicts in principle with those decisions in the Fifth, Sixth and Ninth Circuits and various district courts holding that the period of limitations for the commencement of proceedings under Title VII should be tolled for the period during which the

[11] *Macklin* v. *Spector Freight Systems, Inc., supra,* 478 F.2d at 994-95 n.30 (D.C. Cir. 1973); *Boudreaux* v. *Baton Rouge Marine Contracting Co., supra,* 437 F.2d at 1017 n.16 (5th Cir. 1971); *Guerra* v. *Manchester Terminal Corp.,* 350 F.Supp. 529 (S.D. Tex. 1972); *Henderson* v. *First National Bank of Montgomery,* 344 F. Supp. 1373 (M.D. Ala. 1972); *Reynolds* v. *Daily Press Inc.,* 5 CCH EPD ¶7991 (E.D. Va. 1972). Contra: *Jenkins* v. *General Motors Corp.,* 354 F.Supp. 1040 (D. Del. 1973).

resolution through arbitration or through the National Labor Relations Board is attempted.[12]

The rationale of the decisions holding that the Section 1981 period of limitation should be tolled by the filing of a charge is that Title VII indicates "a recent Congressional decision to favor informal methods of settlement and conciliation short of litigation in employment cases" and that "[p]laintiffs, who often proceed initially without assistance of counsel and bring their complaint first to EEOC in accord with this legislative policy, should not be penalized for this action when they later sue for relief in District Court under both Title VII and § 1981, which overlaps Title VII." *Macklin* v. *Spector Freight Systems, Inc., supra,* 478 F.2d at 994-95 n.30. Under the contrary rule adopted by the Sixth Circuit, in order for petitioner to have preserved both his Title VII and his Section 1981 claims, he would have to have both filed a charge with EEOC, and, within one year after his discharge (21 months before EEOC made its finding of reasonable cause and two and one-half years before it issued the right-to-sue letter), filed a lawsuit under Section 1981. Such a requirement, by discouraging or rendering futile (by the prior determination of the Section 1981 action) recourse to the Congressionally favored policy of conciliation, would vitiate the administrative procedures of the EEOC and be adverse to the interests of judicial economy.

The view that the Section 1981 limitation period should be tolled during the pendency of proceedings before the EEOC comports with the position adopted by this Court in *Burnett* v. *New York Central R. Co.*, 380 U.S. 424 (1965)

[12] *Culpepper* v. *Reynolds Metals*, 421 F.2d 888 (5th Cir. 1970); *Schiff* v. *Mead Corp.*, 3 CCH EPD ¶8043 (6th Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Wells* v. *Gainesville-Hall County Economic Opportunity Organization, Inc.*, 5 CCH EPD ¶8541 (N.D. Ga. 1973); *Guerra* v. *Manchester Terminal Corp., supra.*

and reaffirmed in *American Pipe and Construction Co.*, v. *Utah*, —— U.S. ——, 38 L.Ed.2d 713 (1974), that where the policies of ensuring essential fairness to defendants and of barring a plaintiff "who has slept on his rights" are satisfied, a statute of limitations should be tolled during the pendency of a related action the outcome of which could provide the relief plaintiff seeks. The filing of a charge with the EEOC puts the respondent on notice of the charging party's substantive claims. There is neither surprise nor the dredging up of a stale claim, and duplicate adjudication is avoided. See *Henderson* v. *First National Bank of Montgomery, supra*, 344 F. Supp. at 1377.

Finally, it is a necessary corollary to this Court's recent holding in *Alexander* v. *Gardner-Denver, supra*, that attempts to seek resolution by means other than litigation should be encouraged not only by rejection of the doctrine of election of remedies, but also by adoption of the rule that such attempts toll the applicable statutes of limitations for commencement of litigation.

II

The Failure of the District Court to Protect the Procedural Rights of Petitioner and the Sanctioning of That Failure by the Court of Appeals Make This a Compelling Case For the Exercise of This Court's Supervisory Authority.

a. Petitioner's Section 1981 Claim Should Not Be Barred by Tenn. Code § 28-304.

Even if the period of limitation on petitioner's Section 1981 claim were not deemed tolled by the filing of his E.E.O.C. charge, the first action and the refiled action should have been held timely under Tennessee's six-year

statute of limitations for actions on contracts[13] or its ten-year statute for actions not otherwise provided for.[14]

In both his supplemental complaint filed in No. C-71-66 and his complaint filed in No. C-72-183, petitioner sought injunctive relief from respondent's discriminatory employment practices and an award of back pay and counsel fees. In both actions petitioner's claims under Section 1981 were dismissed by the application of that portion of Tenn. Code § 28-304 which provides a one-year limitation period on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes" (2a, 10a). The Court of Appeals affirmed, ignoring the point that this action was not one for compensatory or punitive damages, but an action in equity for injunctive relief and back pay.[15] While Tenn. Code § 28-304 may be applicable to other types of civil rights actions, it is clearly inapplicable by its very terms to the case at bar. The Tennessee limitation provision that would seem to apply is either its statute for actions on contracts,[16] given that Section 1981

---

[13] Tenn. Code §28-309.

[14] Tenn. Code §28-310.

[15] Courts of Appeals which have considered the question have rejected the contention that back pay is "damages":

> "The demand for back pay [in a Title VII action] is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not the jury."

Johnson v. *Georgia Highway Express*, 417 F.2d 1122, 1125 (5th Cir. 1969). Accord: *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir.), cert. denied 404 U.S. 1006 (1971); see also, *U.S.* v. *N. L. Industries, Inc.*, 479 F.2d 354, 380 (8th Cir. 1973).

[16] Tenn. Code §28-309 (six years). See *Boudreaux* v. *Baton Rouge Marine Contracting Co., supra*, 437 F.2d at 1017 n.16 (5th Cir. 1971). But see *Buckner* v. *Goodyear Tire & Rubber Co.*, 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd per curiam*, 476 F.2d 1287 (5th Cir. 1973), in which the court applied a statute of limitations for actions for "injury to the person or rights of another, not aris-

protects the right "to make and enforce contracts," or its residuary statute for civil actions not otherwise provided for.[17] Under either of these, petitioner's Section 1981 claim was timely filed.

Indeed if, contrary to its plain language, Tenn. Code § 28-304 were applicable, it would be violative of both the supremacy clause of Article VI of the Constitution, in that it discriminates against rights arising under federal laws,[18] and the equal protection clause of the Fourteenth Amendment, in that it creates an (ineptly camouflaged) explicit racial classification, drawing a distinction between those who seek the law's protection against racial discrimination in employment and those who seek to vindicate their employment rights on other grounds.[19]

---

ing from contract," but noted that "one may indeed ask whether, after all, the more appropriate standard should be the doctrine of laches." 339 F. Supp. at 1117 n.9.

[17] Tenn. Code §28-310 (ten years). See *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970); *Macklin* v. *Spector Freight Systems, Inc., supra*. In *Macklin* the court noted that it did not have to decide whether the contract statute of limitations might be more closely analogous, since the limitation period would have been the same. 478 F.2d at 994-95 n.30.

[18] *Republic Pictures* v. *Kappler*, 327 U.S. 757 (1946), *aff'g* 151 F.2d 543 (8th Cir. 1945); *McKnett* v. *St. Louis & S.F. R.Co.*, 292 U.S. 230 (1934).

[19] *Hunter* v. *Erickson*, 393 U.S. 385 (1969).

b. A Claim Under 42 U.S.C. § 1981 Does Not Require Prior Exhaustion of Administrative Remedies Under the Railway Labor Act.[20]

The ruling of the District Court that petitioner's cause of action under Section 1981 was barred by his failure to pursue his administrative remedy under the Railway Labor Act (10a) is contrary to this Court's holding in *Glover* v. *St. Louis & San Francisco R. Co.*, 393 U.S. 324 (1969). In *Glover*, plaintiffs sued the railroad and the union, claiming that they had been discriminated against on account of their race. Rejecting the contention that the complaint should have been dismissed for failure by plaintiffs to exhaust their remedies under the Railway Labor Act, this Court pointed out that "insistence that plaintiffs exhaust the remedies administered by the union and the railroad would only serve to prolong the deprivation of rights to which these petitioners according to their allegations are justly and legally entitled." 393 U.S. at 331. See also, *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944); *Alexander* v. *Gardner-Denver Co., supra*, 39 L.Ed. 2d at 164, n. 19.

Furthermore, it has been recognized by the Courts of Appeals for the Third, Fourth, Fifth, Seventh, Eighth and District of Columbia Circuits that Section 1981 creates an independent right of action not requiring exhaustion

---

[20] The Court of Appeals found it unnecessary to rule upon this question. However, since the District Court's holding that petitioner's Section 1981 action should be dismissed for failure to exhaust his Railway Labor Act remedies would keep petitioner out of court even if he should prevail on the tolling issue, we ask the Court to rule on this question in furtherance of sound judicial administration. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 226 (1958).

of administrative remedies under other federal statutes.[21] Clearly, the District Court was in error in ruling that petitioner was barred from suing on his Section 1981 claim for failure to exhaust administrative remedies under the Railway Labor Act.

c. Petitioner's Title VII Action Should Not Have Been Precluded by His Failure to Refile His Complaint Within 30 Days After Dismissal.

After it permitted petitioner's court-appointed attorney to withdraw, the District Court dismissed petitioner's complaint in C-71-66 *sua sponte*, without a hearing. Its order of dismissal contained no notice that petitioner must refile his complaint within thirty days. The subsequent dismissal by the District Court in No. 72-183 of petitioner's Title VII complaint is in conflict with the principles enunciated by this Court with respect to liberal construction of the procedural requirements of Title VII[22] and to the Congressional policy against discrimination.[23]

With respect to the initial filing of a complaint under Title VII, "certain equitable principles may operate to toll the 30 day requirement." *Gates* v. *Georgia Pacific*

---

[21] *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757 (3rd Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972); *Caldwell* v. *National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, *supra*; *Brady* v. *Bristol-Myers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Macklin* v. *Spector Freight Systems, Inc.*, *supra*.

[22] *Love* v. *Pullman*, 404 U.S. 522 (1972).

[23] *Newman* v. *Piggie Park*, 390 U.S. 400 (1968).

Corp., 7 CCH EPD ¶9185 (9th Cir. 1974).[24] This Court has recently affirmed this principle, stating that "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *American Pipe and Construction Co.* v. *Utah, supra,* 38 L.Ed. 2d at 730.[25] Where, as in the case at bar, the plaintiff has not had a clear notice of the time limitation on his right to sue and has acted with all of the diligence and promptness which could be expected, it has been held that the limitation period does not start running until the plaintiff receives explicit notice.[26] That rule should apply here: petitioner's time for refiling his complaint should not have started until the District Court, knowing that he was un-

---

[24] Accord: *Harris* v. *Walgreen's Distribution Center,* 456 F.2d 588 (6th Cir. 1972); *McQueen* v. *E.M.C. Plastics Co.,* 302 F.Supp. 881 (E.D. Tex. 1969).

[25] See also *Burnett* v. *New York Central R. Co., supra; Holmberg* v. *Armbrecht,* 327 U.S. 392 (1945).

[26] *Gates* v. *Georgia Pacific Corp., supra,* 7 CCH EPD ¶9185 at 6944. Indeed, the Sixth Circuit reversed a lower court's failure to accept a renewed motion for the appointment of counsel made after the first motion had been denied and more than thirty days after the receipt of the notice of right to sue, stating:

> [P]ursuant to the Congressional purpose when after decision on the motion for counsel the time remaining is unreasonably short for securing a lawyer and filing the complaint, the District Judge's order granting or denying the motion for appointment of Counsel should set a reasonable time.

Harris v. *Walgreen's Distribution Center, supra,* 456 F.2d at 592. The only order made by the District Court in C-71-66 relating to dismissal of the action was that entered ~~March~~ February 16, 1972 (4a-5a). That order set no time for the refiling of petitioner's complaint.

represented by counsel, notified him that he had thirty days within which to refile.[27]

Similarly, courts have been liberal in their interpretation of what constitutes the commencement of a Title VII action, holding that a motion for appointment of counsel tolls the running of the thirty-day period.[28]

The rationale of these cases applies with special vigor to the instant case. Here petitioner diligently sought to prosecute his action and obtain counsel. He had no notice of his duty to reinstitute suit within 30 days. More importantly, petitioner would never have run afoul of any rule requiring him for a second time to meet the thirty-day filing requirement but for the District Court's *sua sponte* dismissal of his complaint with full knowledge that petitioner had at the outset relied on the court to appoint counsel. The equities here require treating Caldwell's February 17, 1972 letter requesting an additional thirty days for petitioner to obtain counsel as the equivalent of a motion for the appointment of counsel, satisfying the revived thirty-day requirement.

After diligently pursuing his case from May 31, 1967, when he filed his charge with the EEOC, to January 24,

---

[27] Respondents could not be said to be disadvantaged by this rule, since this was a case of first impression in the Sixth Circuit and the Tennessee savings statute, Tenn. Code §28-106 provides a one-year period for commencement of a new action when a "judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action." The only case holding that a Title VII case must be recommenced within 30 days after dismissal without prejudice was *McClendon* v. *North American Rockwell Corp.*, 2 CCH EPD ¶10,243 (C.D. Cal. 1970), where there was no such savings statute.

[28] *Harris* v. *Walgreen's Distribution Center, supra; McQueen* v. *E.M.C. Plastics Co., supra; Prescod* v. *Ludwig Industries*, 325 F. Supp. 414 (N.D. Ill. 1971); *Austin* v. *Reynolds Metal Co.*, 327 F.Supp. 1145 (E.D. Va. 1971).

1973, the date of dismissal of his second complaint, petitioner found himself, in the words of the District Court, in the "regrettable" position of having his complaint "dismissed without a hearing on the merits by reason of the circumstances alluded to" (12a). The court below never discussed one of the questions assigned as error, namely that the District Court abused its discretion by failing to reopen the first action, C-71-66, pursuant to its powers under Rule 60(b), F.R. Civ.P. It could have done so either by treating Caldwell's letters of February 17 or May 5, 1972 or the refiled complaint as a motion, or by acting on its own motion.[29]

This court has established the principle that Rule 60(b) is to be liberally construed and that any doubt is to be resolved in favor of an application to set aside a default judgment or a dismissal for lack of prosecution in order that a case may be tried on the merits. *Klaprott* v. *United States*, 335 U.S. 601 (1949). Numerous courts of appeals have reversed the denial of relief under Rule 60(b)(1) and (6) as an abuse of judicial discretion.[30]

In *Denman* v. *Shubow, supra,* a case strikingly close on its facts to the case at bar, plaintiff, appearing *pro se* in a civil rights action, overslept because he had taken some prescribed medication and missed a calendar call, whereupon his case was dismissed without prejudice for lack of prosecution. In the afternoon of the same day, after calling the clerk to explain his absence and learning of the dismissal, he filed a handwritten motion for reconsideration,

---

[29] *McDonnell* v. *Celebrezze*, 310 F.2d 43 (5th Cir. 1962); *United States* v. *Jacobs*, 298 F.2d 469 (4th Cir. 1961).

[30] *Denman* v. *Shubow*, 413 F.2d 258 (1st Cir. 1969); *Hutton* v. *Fisher*, 359 F.2d 913, 916 (3rd Cir. 1966); *Radack* v. *Norwegian American Line Agency, Inc.*, 318 F.2d 538, 542 (2nd Cir. 1963); *Rooks* v. *American Brass Co.*, 263 F.2d 166 (6th Cir. 1959); *Patapoff* v. *Vollstedt's, Inc.*, 267 F.2d 863 (9th Cir. 1959).

which the district court denied. The Court of Appeals for the First Circuit reversed, stating:

> "When the circumstances surrounding plaintiff's tardiness were brought to the district court's attention by the motion for reconsideration, we think the ends of justice would have been better served if the district court had taken the necessary steps to assign the case for trial on the merits. This *pro se* plaintiff would thereby have been assured of his day in Court." (413 F.2d at 259.)

Similarly, in the instant case the District Court should have assured petitioner of a trial on the merits by reopening C-71-66 after Caldwell explained petitioner's plight and asked for a thirty-day extension of the time to obtain counsel or after he entered his appearance and asked that the order of dismissal be vacated.

d. Petitioner's Claims Against the Union Locals and Claim Against REA on the Issue of Supervisory Training Are Not Barred by the Doctrine of *Res Judicata*.

In its order of June 14, 1971, the District Court granted summary judgment to respondent union locals and partial summary judgment to respondent REA (2a). Upon the filing of petitioner's second complaint, following dismissal of the first without prejudice, respondents moved to dismiss on the ground, *inter alia*, that the interlocutory summary judgment order constituted *res judicata*. Accepting this contention, the District Court dismissed all of petitioner's claims against the union locals (9a) and his claim against REA on the issue of supervisory training (10a).

On appeal, the Court of Appeals did not discuss this issue, but in its opinion denying rehearing the Court of

Appeals, in a footnote, affirmed the District Court's conclusion (23a).

These rulings are erroneous and should be reversed. It is hornbook law that *res judicata* effect can be given only to final decisions on the merits. See 1B Moore's Federal Practice ¶ 0.401 (2d Ed. 1965). The District Court's summary judgment order dismissing fewer than all of the defendants was neither final nor appealable, Rule 54(b), F.R. Civ. P., as the Sixth Circuit itself has recognized. *Balsbaugh* v. *City of Westland*, 458 F.2d 1358 (6th Cir. 1972). Accord: *Sullivan* v. *Delaware River Port Authority*, 407 F.2d 58 (3rd Cir. 1969); *Hamman* v. *United States*, 399 F.2d 673 (9th Cir. 1968). It could not be given *res judicata* effect, unless by a subsequent order of the court. The only subsequent order, however, was Judge Brown's order of February 16, 1972 dismissing the complaint without prejudice (4a-5a). Since dismissal without prejudice is not an adjudication on the merits, such an order cannot have *res judicata* effect.[31] *Public Service Commission* v. *Brashear* Freight Lines, 312 U.S. 621 (1941). Even if it were thought, as respondents have argued below, that the interlocutory order merged into the subsequent order of dismissal without prejudice, it does not thereby acquire *res judicata* finality.[32] Petitioner, whose first complaint was dismissed solely because he did not have a lawyer, could hardly have been required to appeal a non-prejudicial order on the theory that an earlier order, unappealable at the time of its entry, had acquired a quality of finality which even the later order lacked.

---

[31] As the court below noted in another context, "[A]n action dismissed without prejudice leaves the situation the same as if the suit had never been brought" (17a).

[32] *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793 (1949); *Town of Marshall* v. *Carey*, 42 F. Supp. 630, 635 (W.D. Okla. 1941).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
10 Columbus Circle
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMON & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

APPENDIX

District Court's Order Dismissing Claims Under 42 U.S.C. §1981 and Granting Summary Judgment to Union Locals and Partial Summary Judgment to REA Express on Title VII Claims

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL C-71-2

THOMAS THORNTON,

Plaintiff,

v.

REA EXPRESS, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants,

—and—

CIVIL C-71-66

WILLIE JOHNSON, JR.,

Plaintiff,

v.

REA EXPRESS, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

ORDER WITH RESPECT TO MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT

Upon consideration, and after argument of counsel, it is hereby ORDERED:

1. Insofar as plaintiffs in both cases sue under Civil Rights statutes other than the Civil Rights Act of 1964, such claims are dismissed for the reasons that there is no Federal statute of limitations governing these claims, that therefore the Tennessee statute of limitations of one year would apply, and both of these claims were barred by such statute at the time they were filed.

2. The motions to dismiss in both cases on the ground that the thirty-day letter filed within the thirty-day period is not sufficient to satisfy the requirement that a complaint be filed within thirty days following the issuance of said letter are overruled. See opinion of Judge Harry W. Wellford, *Joeanna Beckum* v. *Tennessee Hotel,* (W.D. Tenn. 1971) attached hereto. Cf. *Rice* v. *Chrysler Corp.,* —— F. Supp. ——, 3 FEP Cases 436 (E.D. Mich. 1971).

3. The motion of the defendant Union locals for summary judgment will be granted on the grounds that from the undisputed facts plaintiffs have no grounds for relief against said Unions under the Civil Rights Act of 1964.

4. The motions of REA Express, Inc. for summary judgment with respect to the claim of dismissal for not giving plaintiffs supervisory training are granted on the ground that from the undisputed facts plaintiffs have not shown any discrimination in this respect.

5. The motions of REA Express, Inc. for summary judgment with respect to the claim of both plaintiffs of discriminatory discharge and with respect to plaintiff

Johnson's claim of denial of equal promotional opportunities and discrimination in job assignment be and the same are hereby denied.

ENTER this 14th day of June, 1971.

/s/ BAILEY BROWN
Chief Judge

A True Copy
W. LLOYD JOHNSON, *Clerk*

By: A. A. BREAUX
Deputy Clerk

FILED
JUN 14 1971

Clerk U.S. District Court
Western Dist. of Tenn.

District Court's Order Dismissing Action Without Prejudice

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL NO. C-71-66

WILLIE JOHNSON, JR.,

Plaintiff,

v.

RAILWAY EXPRESS AGENCY, INC., *et al.,*

Defendants.

ORDER DISMISSING ACTION WITHOUT PREJUDICE

In this cause, this Court heretofore appointed Robert Rose of the Memphis Bar to represent this plaintiff, as well as the plaintiff Thomas Thornton in C-71-2, which are EEOC claims by these plaintiffs against REA Express and others. Thereafter, after various proceedings in these matters, counsel for the plaintiffs appeared in court and stated that he had managed to obtain an offer of settlement from REA Express, that plaintiff Thornton had agreed to accept the settlement, but plaintiff Johnson was unwilling to do so. Counsel further stated to the Court that in all frankness, in view of the staleness of the claim and other reasons, he had strongly recommended these settlements, but had been unable to persuade plaintiff Johnson to accept. The cases were set for trial on February 2,

District Court's Order Dismissing Action Without Prejudice

1972, and Mr. Rose filed a motion on or about January 7, 1972 to be relieved as attorney for plaintiff Johnson, which the Court granted on January 14, 1972. On the latter date, the Clerk of this Court, under direction of the Court, wrote to plaintiff Johnson stating that Mr. Rose had been relieved, that the setting for trial on February 2, 1972 would have to be reset, and that plaintiff Johnson was allowed 30 days from that date to obtain other counsel or his case would be dismissed without prejudice. Since such 30 days have passed without plaintiff having obtained such counsel and so notifying the Clerk as he was directed, this cause should be dismissed without prejudice.

It is therefore ORDERED and ADJUDGED that this action be and the same is hereby dismissed without prejudice.

ENTER this 15th day of February, 1972.

/s/ BAILEY BROWN
Chief Judge

A True Copy.
Attest:
W. LLOYD JOHNSON
(Illegible)

FILED
FEB 16 1972

Clerk U.S. District Court
Western Dist. of Tenn.

District Court's Opinion and Order Dismissing Refiled Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-72-183

WILLIE JOHNSON, JR.,

Plaintiff,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

ORDER ON DEFENDANT MOTIONS FOR JUDGMENT

This is an action brought by a former employee of Railway Express Agency, Inc. (REA) against that carrier and two local lodges of the BRAC, i.e., the Tri-State Local and the Lily of the Valley Local (BRAC Locals) alleging violations of the civil rights of the plaintiff under federal statute. Jurisdiction is asserted pursuant to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A., Sec. 2000e, et seq.), the provisions of other federal statutes protecting civil rights set forth in 42 U.S.C.A., Sections 1981, 1982 and 1988, and the provisions of Title 28 of the United States Code, Section 1343. The complaint asks for injunctive relief, compensatory damages, and the award of costs of the action together with reasonable attorneys' fees.

District Court's Opinion and Order Dismissing Refiled Complaint

Paragraph VIII of the present complaint states that "this is the second complaint filed by plaintiff against defendants REA and Union Locals concerning the matters set forth herein and seeking the relief requested herein." Said paragraph VIII then goes on to recite the following facts with respect to the prior complaint:

> "On February 12, 1971, this Court entered orders appointing Robert E. Rose as attorney for plaintiff and allowing plaintiff's 'Notice of Right to Sue' letter be filed and treated as a complaint on a pauper's oath, which documents were docketed as Civil No. C-71-66. Subsequently, on March 18, 1971, a 'Supplemental Complaint' was filed on plaintiff's behalf by his court-appointed attorney. Defendant REA filed its answer on March 29, 1971, and defendant Union Locals filed their answer on April 6, 1971. Thereafter, the case was set for trial on August 18, 1971. On April 30, 1971, defendants Union Locals filed a motion to dismiss or in the alternative for summary judgment, with supporting affidavits and memoranda of law. May 11, 1971, defendant Union Locals propounded 43 numbered interrogatories to plaintiff. June 3, 1971, defendant REA filed a motion to dismiss or in the alternative for summary judgment, along with supporting affidavits and memoranda of law. No memoranda or affidavits were ever filed on behalf of plaintiff in opposition to defendants' motions.
>
> On June 30, 1971, the Honorable Bailey Brown, Chief Judge of this Court, entered an order on defendants' motions, which: (1) dismissed plaintiff's claims insofar as they were based on statutes other than Title

> VII of the Civil Rights Act of 1964; (2) granted summary judgment to defendant Union Locals; (3) granted summary judgment to defendant REA 'with respect to the claim of dismissal for not giving plaintiffs supervisory training'; (4) denied defendant REA's motion with respect to plaintiff's charge of discriminatory discharge and plaintiff's claim of denial of equal promotion opportunities and discriminatory job assignments; (5) denied the defendants' motions to dismiss on the grounds that filing the 'Notice of Right to Sue' letter did not constitute the filing of a complaint within the time allowed. This order was a consolidated ruling in plaintiff's case and in No. C-71-2 (Thomas Thornton v. the same defendants)."

The complaint, with respect to prior history of this dispute, also sets out in substance that plaintiff's appointed counsel, Mr. Rose, failed to take discovery and to prepare the case for trial, and being dissatisfied with plaintiff's cause of action and his refusal to settle, was permitted by Judge Brown to withdraw as counsel (purportedly without notice to plaintiff) within a few weeks before the date fixed for trial. Plaintiff further asserts and the record bears out in the prior action that Judge Brown directed the Court Clerk to notify plaintiff that if he did not obtain another counsel within 30 days his claim would be dismissed without prejudice.

Plaintiff's present counsel after being contacted (for the second time) by plaintiff within the prescribed 30 day period wrote to Judge Brown within a day or two *after* this period had elapsed, requesting an additional 30 days for plaintiff to secure legal representation. The Court had,

however, on the 30th day (February 16, 1972) entered an order dismissing the case *without* prejudice. This action has been subsequently filed on May 31, 1972.

At no time did plaintiff Johnson appeal to the United States Court of Appeals for the Sixth Circuit the order of Judge Brown dated June 14, 1971, granting the BRAC Locals summary judgment with respect to the claims upon Title VII of the Civil Rights Act of 1964 and dismissing plaintiff Johnson's claims based upon other federal statutes.

Plaintiff's Claim Against Defendant Unions

This action clearly involves the same parties and the same subject matter of dispute as were before Judge Brown.[1] Unless plaintiff can establish a basis for us to act otherwise, the doctrine of res adjudicata would bar his bringing this claim again after a final disposition by Judge Brown. *Sopp* v. *Gehrlin,* 236 F. Supp. 823 (W.D. Pa. 1964) and *Burton* v. *Peartree,* 326 F. Supp. 755 (E.D. Pa. 1971), *Vassos* v. *Societa Trans-Oceania,* 272 F.2d 182 (2nd Cir. 1960), *cert. denied, Haldane* v. *Wilhelmina Helen King Chagnon,* 345 F.2d 601 (9th Cir. 1965). We do not subscribe to any theory that because of alleged improper representation, absent fraud or wrongdoing on defendant's part, that a civil litigant should be permitted a "second bite at the apple" after an adverse ruling in a prior proceeding resulting in an unappealed final decision of a court assertedly having proper jurisdiction. Of course, if Judge Brown had no such jurisdiction of thet parties, neither do we. The motion of defendant unions, either for dismissal, or for summary judgment, is granted on grounds of res adjudicata. Other grounds are discussed hereinafter.

[1] The complaints in both causes are substantially similar.

District Court's Opinion and Order Dismissing Refiled Complaint

Plaintiff's Claim Against REA

1. Plaintiff's claims of violation of his civil rights under 42 U.S.C. 1981 through 1988 were properly dismissed and are here dismissed because barred by the applicable Tennessee one year statute of limitations. *Ellenburg* v. *Shepherd*, 406 F.2d 1331 (6th Cir. 1968) and *Mulligan* v. *Schlachter*, 389 F.2d 231 (6th Cir. 1968). In addition, plaintiff's cause of action under these sections would be subordinate to provisions of the Railway Labor Act which governs the defendant employer (and the defendant unions). See also *Oliphant* v. *Brotherhood Firemen, et al.*, 262 F.2d 359 (6th Cir. 1958) *cert. denied*, 359 U.S. 935. No effort was made by plaintiff to protect or assert his rights under the administrative procedures available under that Act. As to all claims of plaintiff other than those asserted under Title VII of the 1964 Civil Rights Act, then, the cause of action is barred under the statute of limitations defense asserted by all defendants and because plaintiff did not pursue his administrative remedy under the Railway Labor Act.

2. Judge Brown's previous order of June 14, 1971, granted defendant REA's motion for summary judgment after a hearing with respect to plaintiff's claim regarding lack of supervisory training "on the ground that from the undisputed facts plaintiff[s] have not shown any discrimination in this respect—" Judge Brown considered the affidavits and evidence before him and dismissed plaintiff's claim in this particular. We hold that Judge Brown's ruling was a final disposition and constitute res adjudicata as to this aspect of plaintiff's claim.

3. It is also asserted that plaintiff has failed to comply with jurisdictional requirements of the Equal Employment

sections of the Civil Rights Act. Judge Brown ruled that under the then circumstances of the case the "30 day provision" of the act did not bar plaintiff's claim because he relied in part upon the Court for advice as to how to file his claim of unlawful racial discrimination and simply filed his notice or letter from Equal Employment Opportunity Commission giving him the right to sue within the requisite 30 day period. This Court in *Beckum* v. *Tennessee Hotel,* Cause C-70-417, ruled similarly on the same issue on May 6, 1971. In *Beckum, supra,* however, we did not rule as to whether this procedure met minimal requirement of F.R.Civ. P. 8a(2). Further complications ensued in this case after Judge Brown's initial ruling on the 30 day statutory requirement and plaintiff's suit was dismissed without prejudice,[2] February 16, 1972. Plaintiff's counsel wrote Judge Brown again on May 5, 1972,[3] requesting reinstatement of the cause explaining the financial inability of plaintiff, and also seeking vacation of the Court's previous order. This Judge Brown declined to do since the case "has long since been dismissed".[4]

Considering all the circumstances of the matter, we find reluctantly that plaintiff has failed to meet statutory requirements and that his refiling should have taken place within 30 days after Judge Brown's February 16, 1972 order. The Chief Judge extended unusual consideration to plaintiff that would not have been granted ordinary civil litigants and we cannot hold under the circumstances that Title VII Civil Rights Act requirements imposed by Con-

[2] It is noted, however, that notice had been issued to plaintiff that his case would be dismissed if he did not obtain a lawyer by the appointed time.

[3] See Exhibit to complaint.

[4] See Exhibit to complaint.

gress may be indefinitely extended by the Courts. Defendant REA's motion to dismiss will therefore be granted. *See Goodman* v. *City Products Corp.*, 425 F.2d 702 (6th Cir. 1970), *Brady* v. *Bristol-Myers, Inc.*, 332 F. Supp. 995 (E.D. Mo. 1971).

It should also be observed that the Equal Employment Opportunity Commission in this case was perhaps partially at fault in the handling of plaintiff's complaint because of the long 4 year delay involved in processing the complaint before issuance of the right to sue notice. It is regrettable that plaintiff's complaint should be dismissed without a hearing on its merits by reason of the circumstances alluded to in this order.

We, nevertheless, grant all defendants' motions and dismiss the complaint filed herein for the reasons stated, but at the cost, under the circumstances, of REA.

HARRY W. WELLFORD
United States District Judge

Date: 1/24/73

A True Copy.

Attest:

W. LLOYD JOHNSON, *Clerk*
By A. A. BREAUX D.C.

FILED
JAN 25 1973

Clerk, U.S. Dist. Court
Western Dist. of Tenn.

Opinion of Court of Appeals

No. 73-1306

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIE JOHNSON, JR.,

Plaintiff-Appellant,

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants-Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Decided and Filed November 27, 1973.

Before WEICK, Circuit Judge, O'SULLIVAN, Senior Circuit Judge, and ALLEN,* District Judge.

WEICK, Circuit Judge. This appeal is from an order of the District Court dismissing plaintiff's complaint which alleged employment discrimination.

Plaintiff-appellant, Willie Johnson, filed timely charges with Equal Employment Opportunity Commission (EEOC) in 1967 in which he alleged that his employer, Railway Express Agency, Inc. (REA), discriminated against him with

* The Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

regard to seniority rules and job assignments. Johnson further asserted that he had been discharged by REA because of his race (black). Johnson also charged the Brotherhood of Railway Clerks Tri-State Local and the Lily of the Valley Local with maintaining segregated Locals.

On December 22, 1967 EEOC filed a report concluding that the company and the unions had engaged in discriminatory practices; however, it was not until January 15, 1971 that Johnson received his notice of right to sue letter from EEOC. Initially Johnson was unable to retain a lawyer to file suit authorized by the letter. On February 12, 1971 District Judge Bailey Brown allowed Johnson to file the EEOC notice-letter with the Clerk as satisfying the duty to institute suit within thirty days from date of receiving notice. Judge Brown further allowed Johnson to proceed *in forma pauperis* and appointed an attorney to represent him. The court-appointed attorney filed an amended complaint on March 18, 1971, setting forth in more detail Johnson's claims.

At this point both defendants moved for summary judgment supported by affidavits. The unions also propounded to plaintiff interrogatories, which he answered. Plaintiff submitted no affidavits in opposition to these motions.

On June 14, 1971 the Court entered an order which—

(1) dismissed all claims based on statutes other than Title VII of the 1964 Civil Rights Act as barred by Tennessee's one-year statute of limitations,

(2) denied the defendants' claims that the filing of the EEOC notice-letter was insufficient to meet the thirty-day filing requirement,

(3) granted the two unions' motions for summary judgment, holding that the plaintiff had no claim against them under the 1964 Civil Rights Act,

(4) granted the motion of REA for summary judgment regarding improper supervisory training, and

(5) denied REA's motion for summary judgment regarding Johnson's claims of discriminatory discharge, denial of promotional opportunities, and discrimination in job assignment.

After this ruling, REA offered Johnson one hundred fifty dollars in settlement of the case; Johnson refused. Subsequently the case was assigned for trial and Johnson's court-appointed attorney, with the Court's permission, withdrew from the case on January 14, 1972. On that date the Clerk of the District Court, acting pursuant to the Court's direction, wrote a letter to Johnson giving him thirty days in which to obtain a new attorney or have his case dismissed without prejudice. Johnson did not obtain a new attorney within such time, and on February 16, 1972 Judge Brown entered an order dismissing the action without prejudice. We need not determine the propriety of this order because it was a final order from which no appeal was taken.

On February 17, 1972 William Caldwell, now one of Johnson's lawyers, wrote to Judge Brown informing him that he, Caldwell, was looking for financial support which would enable him to take Johnson's case. The letter was clearly not an announcement that Caldwell was his counsel; the letter stated only that he might be Johnson's counsel at some point in the future. Later Caldwell found such financial support and did undertake to represent Johnson. On May 31, 1972 a second complaint was filed against REA and the unions, with Caldwell acting as counsel for Johnson.

All of the defendants moved for dismissal or, in the alternative, for summary judgment. The case was assigned

to District Judge Wellford, who ruled on these motions on January 25, 1973. First, the Court dismissed Johnson's claims against the unions on grounds of *res judicata,* holding that the present suit involved the same parties and the same subject matter decided in the first action where summary judgment was granted by Judge Brown. Second, the Court held that Johnson's claims of violation of his civil rights under 42 U.S.C. §§ 1981 through 1988, were barred by Tennessee's one-year statute of limitations. Third, the Court found that Johnson did not pursue properly his administrative remedies under the Railway Labor Act. Fourth, the Court held that *res judicata* barred Johnson's claims against REA on the issue of supervisory training. Fifth, the Court ruled that Johnson's failure to refile a lawsuit within thirty days from February 16, 1972 (the date of dismissal without prejudice) resulted in a failure to comply with the thirty-day filing requirement.

We will deal first with the thirty-day filing requirement since failure to meet it results in a lack of jurisdiction. *Goodman* v. *City Prods. Corp.,* 425 F.2d 702 (6th Cir. 1970).

Johnson contends that he was not required to file suit within thirty days after dismissal without prejudice. He argues that the only statutory requirement is that he file his original suit within thirty days after receipt of his notice-letter. We disagree. We rely on our decision in *Bomer* v. *Ribicoff,* 304 F.2d 427 (6th Cir. 1962), and the decision in *McClendon* v. *North American Rockwell Corp.,* 2 CCH Employment Prac. Dec., Par. 10,243 (C.D. Cal. 1970).

In *Bomer,* plaintiff's request for increased benefits under the Social Security Act was denied on August 4, 1959. He was advised that he could file a civil action within sixty days, challenging this determination, since there was a

statutory procedure for such challenge within that time span. He filed such suit on September 30, 1959. On May 5, 1960, on his motion his case was dismissed without prejudice. Plaintiff later refiled his action on May 1, 1961. The Government moved to dismiss, contending that the plaintiff failed to commence suit within sixty days after notice of the final decision on August 4, 1959. The District Judge granted the Government's motion and dismissed the case. In affirming, Judge Shackelford Miller wrote for a unanimous court:

> An action dismissed without prejudice leaves the situation the same as if the suit had never been brought. A. B. Dick Co. v. Marr, 197 F.2d 498, 502, C.A. 2nd; cert. denied, 344 U.S. 878, 73 S.Ct. 169, 97 L.Ed. 680, rehearing denied, 344 U.S. 905, 73 S.Ct. 282, 97 L.Ed. 699; Bryan v. Smith, 174 F.2d 212, 214, C.A. 7th. In the absence of a statute to the contrary a party cannot deduct from the period of the statute of limitations the time during which the action so dismissed was pending. Humphreys v. United States, 272 F.2d 411, 412, C.A. 9th; Willard v. Wood, 164 U.S. 502, 523, 17 S.Ct. 176, 41 L.Ed. 531; DiSabatino v. Mertz, 82 F. Supp. 248, 249-250, M.D.Pa.
>
> The right of action here sought to be enforced is one created by statute and is limited by the provisions thereof as to the time within which the right must be asserted. Such conditions operate as a condition of liability rather than as a period of limitation and there can be no recovery unless the condition precedent is fulfilled. Zeller v. Folsom, 150 F. Supp. 615, 617, N.D.N.Y.; Coy v. Folsom, 228 F.2d 276, 279-280, C.A. 3rd; Ewing v. Risher, 176 F.2d 641, C.A. 10th; Scott v.

> Railroad Retirement Board, 227 F.2d 684, 686, C.A. 7th. (304 F.2d at 428, 429)

Additionally, in *Kington* v. *United States,* 396 F.2d 9 (6th Cir. 1968), we held that filing of previous actions in state and federal courts, which were voluntarily dismissed, did not toll the two-year statute of limitations of the Federal Tort Claims Act, 28 U.S.C. § 2401 (b).

McClendon, supra, is the case factually closest to the one at bar. There, plaintiff received a right to sue letter on January 15, 1968, and filed an action on January 19, 1968 which was dismissed without prejudice on September 9, 1969. On October 29, 1969, fifty days later, the plaintiff filed another complaint, identical to the first. Defendant moved for dismissal on the ground that the court lacked subject matter jurisdiction since the complaint was not filed within thirty days following receipt of the right to sue letter.

In *McClendon* the District Court noted that the effect of voluntary dismissals without prejudice, absent a savings statute, was to create a situation the same as though the suit had never been brought. The Court stated:

> Even assuming that the jurisdictional time period should begin to run anew as of the date of voluntary dismissal was entered, such a position would be of no benefit to plaintiff in this case. Dismissal was ordered on September 9, 1969. Suit, however, was brought on October 29, some fifty days later. Thus even if the Section 706(e) time period of thirty days was tolled by the first suit, plaintiff's new suit would still be jurisdictionally defective. 2 CCH E. P. Dec. at 974.

Although *Bomer* and *McClendon* are authority for the proposition that the filing of a suit which was dismissed

without prejudice did not toll the thirty-day filing requirement of Title VII, the District Court was of the view that the complaint should have been refiled within thirty days after such dismissal. But, even extending the time an additional thirty days, the new suit was still jurisdictionally defective because it was not filed within that time.

We are of the opinion that the District Court was clearly correct in holding that at a minimum Johnson had to file the new case within thirty days from the date of dismissal without prejudice.

Any other holding would result in plaintiff's having no time limitation to refile in this type of an action after the action had been dismissed without prejudice. Such latitude for a plaintiff would create uncertainty, delay in processing his claim, and the possibility of stale claims being pursued. Here, the claim was already stale before the initial suit was filed. 42 U.S.C. § 2000e-5(e) was meant to eliminate such possibilities.

Any error that was committed was an error in favor of appellant Johnson. He failed to comply even with the District Court's liberal interpretation of the requirement by his failure to file within thirty days after dismissal. The Title VII claims are thus barred since the Court was without jurisdiction to hear the charges set forth in the new complaint filed on May 31, 1972.

The second question for consideration is whether Johnson's claims under 42 U.S.C. §§ 1981, 1982 and 1983, were time-barred by a Tennessee statute of limitations. Both Judge Brown's first ruling and Judge Wellford's later order found that these claims were time-barred. We agree. It is the duty of Federal Courts to apply the state statute of limitations most analogous to these actions. Appellant agrees

with this but differs only as to what is the most analogous statute.

We feel that the most analogous statute is Title 28, Section 304, of the Tennessee Code. It reads as follows:

> *Personal tort actions—Malpractice of attorneys—Civil rights actions—Statutory penalties.*—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and statutory penalties shall be commenced within one (1) year after cause of action accrued.

Appellant contends that while this state statute, Section 304, is appropriate for Sections 1983 and 1985 actions, it is not appropriate for § 1981 actions. However, *Snyder* v. *Swann,* 313 F. Supp. 1267 (E.D. Tenn. 1970), held this precise statute applicable to a Section 1981 action.

Appellant further contends that his complaint sounds in contract and is governed by a six-year statute of limitations. In our opinion, the complaint sounds in tort rather than in contract. Moreover, the very language of the state statute refers to "civil actions . . . brought under the federal civil rights statutes." Thus, the tort-contract dichotomy does not have to be resorted to, given the preciseness of the state statute.

Finally on this point, appellant argues that filing of the charges with the EEOC tolls the statute of limitations under 42 U.S.C. § 1981. We reject this claim. In *Williams* v. *Hollins,* 428 F.2d 1221 (6th Cir. 1970), we declined to toll

the statute in a section 1983 action during the time when plaintiff was in a Tennessee jail, since Section 301 of Title 28 of the Tennessee Code did not contain any such savings clause. In addition, appellant concedes the Title VII and Section 1981 claims are independent. Thus, no reason exists for stopping the running of a state statute of limitations while a charge is pending before the EEOC.

We have considered other points assigned as error, but in view of our disposition of the case they do not require discussion.

The judgment of the District Court is affirmed.

Order Denying Rehearing

No. 73-1306

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIE JOHNSON, JR.,

Plaintiff-Appellant,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants-Appellees.

ORDER ON PETITION FOR REHEARING

Before WEICK, Circuit Judge, O'SULLIVAN, Senior Circuit Judge, and ALLEN,* District Judge.

This cause came on to be heard on the petition for rehearing, with a suggestion that it be heard en banc; and no Judge having requested that a vote be taken on whether said petition should be heard en banc, the petition for rehearing was referred to and was considered and determined by the panel.

The basis of the first part of our opinion was that when a Title VII (1964 Civil Rights Act) action was dismissed without prejudice, the plaintiff against whom the order was

* The Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

entered had thirty days to refile the complaint.[1] Failure to meet this requirement was held to result in a jurisdictional defect.

Appellant's basic argument in his brief supporting the petition for rehearing is that the Tennessee Savings Statute, T.C.A. 28-106, grants an entire year after such dismissal without prejudice to refile in the State Court. Appellant argues that this state statute is applicable because the federal statute involved gives no guidance as to time limitations.

It is clear that in civil rights actions brought under 42 U.S.C. §§ 1981 through 1988, a state statute of limitations is looked to because the federal statute is silent. *Madison* v. *Wood*, 410 F.2d 564 (6th Cir. 1969). However, Title VII of the 1964 Civil Rights Act is far from silent in regard to a limitations period for actions brought pursuant to the Act. It grants to claimants thirty days from the date of receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) within which to file suit in the Federal District Court.

The state statute of limitations and its savings clause are never reached in this case because the federal statute is not silent. While the language of the federal statute may not cover the situation precisely, it indicates a clear policy that should be looked to before a state statute is

---

[1] The District Court held that many of the issues raised by the plaintiff in his second suit were decided against him in the first action in which the Court granted summary judgment against the plaintiff, and reconsideration was barred by the doctrine of res judicata. Johnson did not appeal from these summary judgments. We agree with the District Court that the unions have a complete defense on the ground of res judicata, and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned.

embraced. The federal statute provides that claimants have thirty days from receipt of a right-to-sue letter, to file law suits. If they have only thirty days to file initially, it is difficult to see why claimants should have more than thirty days to refile after dismissal without prejudice, particularly when such refiling is ordered by the Court.

The requirement of refiling within thirty days seems ample time. A complaint is easily drawn and filed; indeed, in this case all that need be done is to refile the original complaint. In these cases of alleged employment discrimination, there is no latent injury waiting to be discovered which would justify an extended period of time in which to refile. The complainant already knew what his grievance was, as it had been pending before EEOC for more than three years before he was authorized to file suit in the District Court. There is no reason not to expect expeditious processing of such claims in accord with a thirty-day requirement.

The second basis for our decision was that appellant's civil rights claims under 42 U.S.C. § 1981 were barred by the Tennessee one-year statute of limitations, T.C.A. 28-304. Appellant's employment was terminated in June, 1967, and the complaint was not filed until March 18, 1971. T.C.A. 28-304 applies to "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes. . . ." Appellant appears not to attack the controlling nature of this statute but rather its constitutionality. Appellant argues that the statute is arbitrary since it places the same limitations period on all federal civil rights statutes.

We see nothing about the statute that violates equal protection or due process rights of any individual. T.C.A.

28-304 is not directed solely at civil rights claims, and even if it were, it would not necessarily be arbitrary in a constitutional sense. The statute applies also to a wide variety of personal tort actions and to claims of malpractice against attorneys.

Appellant relies on *Hunter* v. *Erickson*, 393 U.S. 385 (1969) and suggests that this statute of limitations creates an explicit racial classification. This contention is obviously unfounded because citizens of all races are entitled to take advantage of the federal civil rights statutes.

Finally, appellant argues that the filing of his Title VII claim with the EEOC tolls the state statute regarding his claims under 42 U.S.C. § 1981. In a letter supplementing his brief supporting his petition for reconsideration, appellant cites *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95 (D.C. Cir. 1973), in which the Court stated in a footnote (n.30) that the filing of charges with the EEOC tolled the statute of limitations on a Section 1981 action. We decline to adopt this position.

It appears to us that the footnote in *Macklin* v. *Spector*, *supra*, is inconsistent with the rationale in the text of the opinion. Spector had argued that since no complaint had been lodged with the EEOC, plaintiff's Section 1981 action had to be dismissed. The Court held, and we think correctly, that no exhaustion of EEOC procedures was necessary to bring a Section 1981 claim, because § 1981 constitutes a cause of action separate and independent from a Title VII claim. The Court said:

> ". . . Section 1981 and Title VII, in truth, provide for such radically different schemes of enforcement and differ so widely in their substantive scopes that using the policies behind the latter to create procedural barriers to actions under the former would stretch

to the breaking point courts' customary duty to accommodate allegedly conflicting legislation." 478 F.2d at 996.

If the two actions "differ so widely in their substantive scopes" the filing of one should not toll the statute of limitations on the other. The Court suggested in the relevant footnote that the basic reason for such tolling was a Congressional desire to favor informal means of accommodation provided for under Title VII. We think that there is enough flexibility in the federal trial system so that conciliation processes will not be destroyed if a Section 1981 case is heard while a Title VII claim is being processed. *Jenkins* v. *General Motors Corp.*, 354 F.Supp. 1040 (D.Del. 1973).

In *Jenkins* the Court also held that no tolling effect on § 1981 claims took place with the filing of Title VII charges with the EEOC. The Court relied heavily on the reasoning in *Young* v. *International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971). *Young* held that Title VII claims and § 1981 claims were separate and independent, and that Title VII imposed no jurisdictional barriers to a § 1981 action. We agree with this reasoning and with that included in the text of the opinion in *Macklin* v. *Spector, supra.*

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

FILED
JAN 15 1974
JAMES A. HIGGINS, Clerk